No. 533.

Brief of Atty. Gen. (Richards & Moore) for Appellee

Filed Feb. 23, 1898.

FILED
FEB 23 1898
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

HENRY HOPKINS ET AL.
v.
THE UNITED STATES. } No. 533.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

HENRY HOPKINS ET AL.
v.
THE UNITED STATES.
No. 533.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This proceeding was instituted, under the direction of the Attorney-General, in accordance with the provisions of section 4 of the antitrust act of July 2, 1890.

Omitting formal averments, the bill charges:

> (THE DEFENDANTS:) That the defendants are members of a voluntary unincorporated association known and designated as the Kansas City Live Stock Exchange, and that they have adopted so-called articles of association and rules and by-laws

whereby they have agreed one with the other that they will faithfully observe and be bound by the same and by such new rules and such additions and amendments thereto as may from time to time be adopted by the association; that the government of said association is vested in a board of eleven directors, and that the business of said exchange is carried on and conducted by said board of directors with the knowledge and consent of the defendants as such members, at the Kansas City stock yards, which is situated in the city of Kansas City, in the State of Missouri, and in the city of Kansas City, in the State of Kansas, and in a building owned by the Kansas City Stock Yards Company, said building being so located that one-half of it is in the State of Missouri and the other one-half thereof in the State of Kansas; that about one-half in number of said defendants have offices and transact business in said stock yards and in said building within the State of Kansas, and the other one-half of said defendants have offices and transact business at said stock yards in the State of Missouri.

(THE STOCK YARDS COMPANY:) That the Kansas City Stock Yards Company owns and controls what is known as the Kansas City stock yards, which are located on both sides of the State line, between Kansas and Missouri, and consisting of yards, pens, chutes, railway tracks, sheds and weighing scales, buildings, and other means and appliances for receiving, yarding, feeding, and shipping cattle, hogs, and other live stock; that said building contains a large number of rooms and offices for the accommodation of the officers of said stock yards company, which are leased to members of said exchange, numbering altogether about three hundred persons.

(METHODS OF BUSINESS:) That substantially all the business transacted in the matter of receiving, buying, selling, and handling cattle and other live stock at said Kansas City is carried on by defendants herein and the other members of said exchange as commission merchants at said Kansas City stock yards, and that a large proportion of said live stock, consisting of cattle, hogs, and sheep, bought, sold, and handled at said stock yards by said defendants and their fellow-members in said exchange are shipped from the States of Kansas, Nebraska, Colorado, Texas, Missouri, Iowa, and Arkansas, and the Territories of Oklahoma, Arizona, and New Mexico; that when said stock is received at said stock yards it is sold by the defendants aforesaid and their associate members of said exchange to the various packing houses situated in Kansas City, Mo., and Kansas City, Kans., and is also sold for shipment to various other markets, and particularly for shipment to the Chicago, St. Louis, and New York markets; that a vast number of cattle, hogs, and other live stock is thus received annually at said stock yards, and so sold and handled by the members of said Kansas City Live Stock Exchange, and that said Kansas City stock market is a public market, and supplies a large number of packing houses located at and near Kansas City, Mo., and Kansas City, Kans., and other points in different States of the Union; that said Kansas City market, next to Chicago, is the largest live stock market in the world; that under the custom and practice which has for many years prevailed, and is now in vogue, at said Kansas City stock yards the live stock received at said stock yards upon its arrival there is delivered to commission merchants who are members of said Kansas City Live Stock Exchange, who receive, handle,

sell, or reship the same for the consignors and owners thereof to other States and Territories, charging therefor a commission for their services in that respect; that in the course of business at said stock yards, and in such buying, selling, handling, and reshipment of cattle, hogs, and sheep, at said Kansas City market, said stock is moved and shifted from that part of said stock yards situated in the State of Kansas to that part of said stock yards located in the State of Missouri and vice versa, according to the convenience of said Kansas City Stock Yards Company; that in the reshipment of stock from said stock yards a portion are shipped from the State of Kansas and a portion from the State of Missouri, the loading pens and chutes of said corporation being, as before alleged, situated in both said States and contiguous to each other.

(MORTGAGES:) That a large proportion of the live stock handled, sold, and reshipped at said Kansas City stock yards by the defendants and other members of said Kansas City Live Stock Exchange are encumbered by mortgages thereon executed by the owners thereof in the various States and Territories aforesaid where said live stock is raised and fed; that said mortgages are made to the defendants and the other members of said Kansas City Live Stock Exchange doing business at said stock yards, and that it is the practice and custom of the defendants and their associates to advance large sums of money to stock growers and owners of cattle in the States and Territories aforesaid, so that the owners of live stock may have the means to feed and prepare them for market; that when said live stock so mortgaged are ready for shipment they are consigned to the defendants and other members of said Live Stock Exchange who have, as aforesaid, made advancements thereon, and on the sale of said stock

the amount of said advancements and interest is deducted from the proceeds of the sale of said cattle by the commission merchants having a lien thereon by mortgage as aforesaid; that 90 per cent of the members of said Live Stock Exchange make such advancements of money on live stock, and the large and growing market for live stock at Kansas City is largely sustained by means of the money so advanced to the cattle raisers by the defendants herein and their associates.

(ONLY AVAILABLE MARKET:) That said stock yards at Kansas City afford to owners, shippers, and dealers in live stock the only available means at that place for handling, selling, and reshipping live stock, and the only available place for those purposes within 200 miles to the north, south, and east of Kansas City, and for 2,000 miles to the west thereof; that by reason thereof said Kansas City stock yards is the only available public market for the purchase and sale of live stock for an exceedingly large territory located in the States and Territories of the United States hereinbefore named, and the only available means for the exchange of interstate traffic in said live stock between the States and Territories aforesaid; that it is, and for several years has been, the daily custom and practice of said defendants and their associates in the conduct of their commission business, to sell live stock in the State of Missouri, which is at the time located at said stock yards in pens in the State of Kansas, and to sell live stock in the State of Kansas which is at the time located at said stock yards in pens in the State of Missouri, and deliveries of said live stock are made on such sales from the State of Kansas to purchasers in the State of Missouri, and deliveries of said live stock are also daily made on such sales from the State of Missouri to purchasers in

the State of Kansas; that all of the commission merchants engaged in the business of buying, selling, and reshipping live stock at said Kansas City market are members of said Kansas City Live Stock Exchange.

(ADVANCEMENTS ON SHIPMENTS:) That it now is, and for several years has been, the custom and practice among a large number of cattle growers and shippers in different States and Territories of the United States, who consign live stock to the Kansas City stock yards for sale, to draw drafts for various amounts on the commission merchants to whom said live stock is consigned, and attaching the bill of lading issued by the carrier therefor, to draw money on said drafts from the local banks throughout the Western States and Territories aforesaid, and when said drafts are presented to the consignees, the commission men aforesaid, at Kansas City, the same are paid by them in the States of Missouri and Kansas, and the proceeds thereof remitted by the collecting banks to the banks located in the various towns and cities from which said live stock was shipped, and who have advanced money on the drafts aforesaid; that by reason of the business at said stock yards being transacted on both sides of the State line between Kansas and Missouri, and by reason of the fact that live stock received, bought, sold, and reshipped at said stock yards are transported from one State to another State of the Union, and in the course of being so received, sold, delivered, and reshipped at the stock yards, are at times in Kansas and at others in Missouri, the said business is interstate in character, and the legislation of the States of Missouri and Kansas is inapplicable thereto, and such business can only be regulated and controlled by Federal legislation, because it is a part of the commerce between the States.

(CONSIGNMENTS HANDLED EXCLUSIVELY BY DEFENDANTS:) That said Kansas City stock market is patronized to a large extent by buyers of live stock who ship their purchases made at said Kansas City stock yards from the States of Kansas and Missouri to States east thereof, and for export to foreign countries, and that such purchasers of live stock at said stock yards have resident agents who make purchases of live stock through the defendants and other members of said Kansas City Live Stock Exchange, and said live stock when so purchased is loaded into railroad cars and carried to Chicago, St. Louis, New York, and other Eastern markets; that large shipments of live stock are made as aforesaid from the States of Missouri, Kansas, Texas, Iowa, Arkansas, Colorado, and the Territories of Oklahoma, Arizona, and New Mexico to said Kansas City stock yards for the purpose of having said live stock sold and the proceeds returned to the owners thereof in the States and Territories aforesaid; that if the person or partnership or corporation to whom said live stock is consigned at Kansas City aforesaid is not a member of said Kansas City Live Stock Exchange and a subscriber to its rules and by-laws, then said consignee is not permitted and can not sell or dispose of said live stock at the Kansas City market, for the reason that the defendants and all the other commission merchants doing and controlling the business at said stock yards, as required by the rules of said exchange, refuse to buy live stock or in any manner negotiate or deal with or buy from a person or commission merchant who is not a member of said Kansas City Live Stock Exchange; that in all such cases the owner of live stock shipped to the Kansas City market is compelled to reship the same to some other market, and by the unlawful combination existing among the defendants and the

other members of said Kansas City Live Stock Exchange is prevented from delivering such live stock to the Kansas City stock yards, and the sale of said live stock is thereby hindered and delayed, thus entailing extra expense and loss to the shipper, and placing an obstruction and embargo on the marketing of all live stock shipped from the States and Territories aforesaid to the Kansas City market which is not consigned to the Kansas City Stock Yards Company, or to the defendants, or other members of said Kansas City Live Stock Exchange.

(RULES:) That the defendants and the other members of said Kansas City Live Stock Exchange have adopted and are governed by certain articles of association, rules and by-laws, which have been subscribed to by each of the above-named defendants, many of which said rules and by-laws are in restraint of trade and commerce between the States, and intended to create a monopoly in contravention of the laws of the United States in that behalf; that Rule IX, adopted by said defendants and their associates in said Live Stock Exchange and now in force as one of its by-laws or rules, provides as follows:

"RULE IX.—*Commission.*

"SECTION 1. The commissions charged by members of this association for selling live stock shall not be less than the following-named rates:

"SEC. 2. Six dollars per carload for single-deck carloads of hogs or sheep and ten dollars per carload for double-deck carloads of the same: *Provided*, Members of this exchange may, after charging commission as above provided, pay a regular sheep salesman on these yards a sum of money contingent on number of sheep sold; said sheep salesman may be in the employ of other members of the exchange.

"SEC. 3. Fifty cents per head for cattle of all ages. In carloads of twenty-four or more not more than twelve dollars per carload; ten dollars per single-deck carload and eighteen dollars per double-deck carload of veal calves.

"SEC. 4. Fifty cents per head for cattle and twenty-five cents per head for calves and ten cents per head for hogs and sheep in mixed carloads, but not to exceed twelve dollars per carload. Fifty cents per head for cattle and twenty-five cents per head for calves driven into the yards, and ten cents per head for hogs and sheep for sixty head or less; more than that number shall be charged for at carload rates.

"SEC. 5. Fifty cents per head for buying cattle for stockers or feeders: *Provided*, Such charges shall not exceed twelve dollars per carload; six dollars per single-deck carload for buying sheep, and ten dollars per double-deck carload. All purchases paid for by a commission house or shipping clearance made by same shall be deemed a purchase and charged for as above provided.

"SEC. 6. Not less than four dollars per single-deck and five dollars per double-deck carload for buying live hogs, and not less than three cents per head for hogs bought by the head.

"SEC. 7. No member or commission firm or corporation represented herein shall do business for a yard trader or speculator on this market for less charges than one-half the regular commission.

"SEC. 8. Firms or corporations represented in this exchange may handle the business of nonresident commission firms or corporations, when the stock is consigned direct to or from said nonresident commission firm or corporation, at half the rates fixed by this rule. Provided, said nonresident commission firms or corporations are established

on one or more of the following markets, to wit: Chicago, Ill.; East St. Louis, Mo.; Denver, Col.; and Pueblo, Col.

"SEC. 9. No member of this exchange or firm or corporation represented herein shall cause or allow to be shipped in his or its name any kind of live stock for the purpose of violating any of the provisions of this rule.

"SEC. 10. No agent, solicitor, or employee shall be hired except upon a stipulated salary, not contingent upon commissions earned (save as provided in section 2 of this rule). No solicitor shall be employed except as a bona fide traveling agent, who shall not solicit consignments local to his own neighborhood only nor to secure his individual trade. Nor shall any agent, solicitor, or employee be hired who is employed by any other party or parties, or who is actively engaged in other business (save as provided in section 2 of this rule). Members of this exchange must file with the secretary within five days of employment the names and addresses of their solicitors. More than three solicitors shall not be employed at one time by a commission firm or corporation. Members of a commission firm or corporation—resident or nonresident of Kansas City—may travel as solicitors, but must be registered as one of the three allowed each firm or corporation. It shall be a violation of this rule for any solicitor representing or claiming to represent a commission firm or corporation in any other market to solicit for any Kansas City firm; and members shall be held accountable for the acts of any solicitor who, under the guise of soliciting for a branch house, solicits for a Kansas City firm or corporation.

"SEC. 11. Any member of this association, or firm or corporation represented herein, sending or

causing to be sent a prepaid telegram or telephone message quoting the market, giving information as to the condition of the same, shall be fined not less than $100 nor more than $500. If said fine is not paid within three days said firm or member shall be suspended until said fine is paid: *Provided, however,* That prepaid messages may be sent to shippers quoting actual sales of their stock on the day made; also to parties desiring to make purchases on this market.

"SEC. 12. Any member of this exchange, or firm or corporation in which he may be a partner, violating any of the provisions of this rule, shall be fined not less than $500 nor more than $1,000 for the first offense; if said fine be not paid within three days said member or firm may be suspended from membership until same is paid. For a second offense said member or firm may be expelled from membership in the exchange.

"SEC. 13. From such fines and special assessments the exchange shall pay a reward of $500 to any party or parties furnishing sufficient evidence to convict any member of a violation of any of the provisions of this rule, and said reward shall be paid immediately after conviction.

"SEC. 14. For the purpose of making effective section 12 of this rule, when the treasurer shall not have on hand, from fines collected, the sum of $500, the directors shall levy a special assessment, pro rata, on each commission firm or corporation buying or selling live stock in this market who is a member of the exchange, and they shall continue to levy such special assessments in such amounts as will keep a fund of $500 constantly on hand for this purpose. Said fund shall be kept as a special fund and shall be used for no other purpose.

"SEC. 15. Each firm or corporation represented in this exchange shall be held responsible for any violation of this rule by any party doing any portion of a commission business in its name, and any penalty imposed for violation of the foregoing shall be on account of such party; if not paid within three days the firm or corporation doing said business shall sever its business connections with such party within ten days. No firm or corporation shall thereafter do any business for such party until said fine is paid."

That all of said defendants have agreed to be bound by and conform to the provisions of said Rule IX, as above set forth, and that the board of directors of said Kansas City Live Stock Exchange have within three months last past suspended members thereof for a violation of the provisions of said rule, and the board of directors of said Kansas City Live Stock Exchange have from time to time exercised jurisdiction over complaints made against members of said exchange for violation of different sections of said rule. That Rule XVI of said Kansas City Live Stock Exchange now in force, and adopted and subscribed to by said defendants, provides as follows:

"RULE XVI.—*Limitations.*

"SECTION 1. No member of the Kansas City Live Stock Exchange shall transact any business with any person violating any of the rules or regulations of this exchange, or an expelled or suspended member, after notice of such violation, suspension, or expulsion has been issued by the secretary or board of directors of the exchange."

(MONOPOLY AND RESTRAINT OF TRADE:) That the defendants have by the adoption of said articles of association, rules, and by-laws, and by associating themselves together in said association known

as the Kansas City Live Stock Exchange, and in carrying out said articles, rules, and by-laws, and by the conduct of business aforesaid as the Kansas City stock yards, conspired and confederated together in violation of the laws of the United States, and particularly in violation of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and in the prosecution of said unlawful combination have agreed and confederated to monopolize the business of buying and selling live stock at said Kansas City market, and to illegally fix and establish a minimum price for buying and selling the same, and have further, in restraint of trade and commerce between the States, confederated together to prevent and restrain the free transmission of information regarding the state of the market of said Kansas City by telegraphic messages and information to the various States and Territories aforesaid, and by the adoption and enforcement of said Rule IX have restricted the free employment of agents and solicitors in the prosecution of the business in which said defendants are engaged as live stock commission merchants, said business being carried on as aforesaid at the Kansas City stock yards.

That the purpose of the defendants and their associates in organizing the Kansas City Live Stock Exchange, and in adopting and enforcing the rules and by-laws aforesaid, was and is to prevent the shipment and consignment of any live stock to the Kansas City market, unless said stock is shipped and consigned to the Kansas City stock yards, and to the defendants or other members of the Kansas City Live Stock Exchange, and that the further purpose of said defendants and their associates in organizing said association and in so preventing the shipment and consignment of live stock to persons other than

themselves was, to compel shippers of live stock from each of said Western States and Territories to pay to defendants and their associates the commissions and charges provided for in said Rule IX, and to prevent all shippers of live stock from said Western States and Territories from placing their property on sale at the Kansas City market, unless such commissions so provided for in said Rule IX were paid to the defendants or their associates in said unlawful combination.

That it was also the purpose of said defendants and their associates, by the means aforesaid, to monopolize the business of receiving, handling, selling, buying, and reshipping all live stock received at the Kansas City market, and all live stock received in said Western States and Territories and shipped to said Kansas City, and also to prevent the sale at said Kansas City market by any person not a member of said Kansas City Live Stock Exchange of any live stock whatever from the States and Territories aforesaid, and to prevent any person other than themselves from acting as commission merchants in and about the sale of live stock at the Kansas City market, and to obstruct and retard the owners of live stock in the States and Territories aforesaid in the sale and disposition of their property in the market at said Kansas City and in the other markets hereinbefore named to which cattle are reshipped or forwarded from said Kansas City stock yards.

The bill concludes with a prayer for a decree dissolving the said Kansas City Live Stock Exchange, and prays—

That said defendants, and each of them, be provisionally and permanently enjoined and prohibited from entering into, or continuing in any sort of com-

bination, contract, agreement, or confederation to deprive the people engaged in shipping, selling, buying, and handling live stock received from the States and Territories aforesaid and intended to be sold to the packing houses at Kansas City, Kans., and Kansas City, Mo., or to other States or Territories, or to foreign countries, from enjoying free access to the market at Kansas City, and to the facilities afforded by the Kansas City stock yards, on the payment of the same rate and charges at said stock yards as are now paid by the defendants and their associate members of said Kansas City Live Stock Exchange.

That said defendants, their servants, agents, etc., be provisionally and perpetually enjoined and restrained from enforcing or acting pursuant to said Rule IX of said Kansas City Live Stock Exchange, or yielding obedience thereto; also from imposing or attempting to impose any of the fines or penalties provided for in said rule; also from discriminating in any manner against any person who is not a member of said Kansas City Live Stock Exchange solely because of such nonmembership; also from refusing, by united or concerted action, to deal or trade with persons who are not members of said Kansas City Live Stock Exchange solely because of such nonmembership; also from entering into any contract, combination, or conspiracy, fixing or tending to fix, directly or indirectly, the price to be charged as commission for buying or selling live stock shipped from one State or Territory for sale or disposition in another State or Territory; also from entering into any contract, combination, or conspiracy limiting, or attempting to limit, the right of any person in business at said Kansas City stock yards to employ labor or assistance, or the right of any such person to send telegrams, prepaid or not, from said stock yards to any other State or Territory.

The answer of the defendants is set forth at length in appellants' brief, at page 8.

A general replication was filed.

The case came on for hearing on application for a temporary injunction upon the pleadings and affidavits of the respective parties.

An outline of the evidence disclosed by the affidavits will be given.

The membership of the exchange companies is made up of *commission merchants* and *packers* (Rec., 154), and numbers about 300 (Rec., 199); the cost of admission has been increased from time to time and is now fixed at $2,500 (Rec., 199).

The pens and yards at the Kansas City market are owned by the Kansas City Stock Yards Company, a corporation in no way connected with the voluntary association known as the Kansas City Live Stock Exchange, except that the stock yards company owns the building in which the commission men have offices, and the commission men are tenants of the stock yards company. The pens and yards of the stock yards company are situated on both sides of the State line between Kansas and Missouri, the line running through the center of the building, dividing it about the middle, and also dividing the pens about equally. (Rec., 148.)

The stock shipped from the West is nearly all unloaded in the State of Kansas at chutes and platforms provided by the railway companies, but a portion of the stock received at the stock yards is unloaded in the State of Missouri. When loaded and shipped out the shipping

is done both in Kansas and Missouri, part of the terminals at the stock yards being in one State and part in the other. (Rec., 149.)

The area of country for which Kansas City is a natural market for live stock is very large and embraces Kansas, Missouri, Arkansas, Indian Territory, Oklahoma, Texas, New Mexico, California, Colorado, Utah, Wyoming, Montana, both Dakotas, Nebraska, Iowa, and others. (Rec., 149.)

In shipping cattle from the country to the Kansas City market it is customary to arrange for what is called through billing with the railroads; that is, if a man ships cattle from Texas to Kansas City he may want to test the market there, and have the right, if the market is not satisfactory, to continue the shipment on as far as Chicago or St. Louis. To do this they arrange for through billing to Chicago or St. Louis, as the case may be, at a through rate. (Rec., 149.)

It is customary for members of the Stock Yards Exchange to make loans to stock raisers and dealers to the aggregate amount of many hundred thousand dollars. A profit is made by the commission man in so making advances to the stock raisers, which consists, first, in the commission derived from the sale of the cattle when shipped to the market, and second, a profit made on the discount of the paper. The notes given to evidence such loans are secured by chattel mortgages and known as "cattle paper," and generally draw 10 per cent interest, and this paper is generally discounted at the various banks at from 5½ to 8 per cent. Probably one-half of

the cattle shipped to and sold at the Kansas City market is encumbered in this method. When money is thus loaned it is the custom to make an agreement to the effect that when the cattle are ready for market the owner will ship the same to the commission man advancing the money and allow a commission for the sale and handling of the same. (Rec., 148, 156, 208.)

The loans thus made by commission men on cattle are made in all the States and Territories above named. In shipping cattle to the Kansas City market the shipments are almost always to some commission house or firm, who look after the arrival, unloading, and care of the cattle after they arrive. (Rec., 149.)

It is also the custom and practice among a large number of cattle growers and shippers residing in the various States and Territories above named to consign cattle to commission men at the Kansas City stock yards, members of the association, for sale, and to draw drafts for various amounts on the commission merchants to whom the same are consigned, and to attach the bills of lading issued by the railroad or carrier thereof for such interstate transit, and to draw money on the same from the local banks in such State or Territory from which the original shipment is made, which drafts are presented to the consignee or commission men at Kansas City, and paid by such commission men in both States of Missouri and Kansas; the proceeds of which drafts are remitted by the collecting bank in Kansas City to the banks located in various towns and cities in the Western States where the shipments originate. (Rec., 151, 156, 207.)

The packing houses or corporations that slaughter cattle and hogs at this market purchase a large per cent of the cattle and nearly all of the hogs that are shipped to the Kansas City market. The packing houses are nearly all incorporated, and their relation to the exchange is through certain members interested in or employees of the packing companies who are members of the exchange. (Rec., 154.)

The volume of business carried on at the stock yards requires the constant use of the telegraph wires and they are largely used by the commission men and stock raisers and dealers in the carrying on of the business at the stock yards. The Western Union Telegraph Company and the Postal Telegraph Company, the companies which control all the telegraph wires that can be reached at Kansas City, have offices in the Stock Exchange Building, and have employed a large number of employees and operatives there. Messages are daily sent and received by the commission men doing business at the stock yards, to and from the various States and Territories in the United States. It is essential that the patrons of the Kansas City market, who raise stock in the States and Territories tributary thereto, should be acquainted almost daily with the state of the market in order that they may have knowledge of the same and information when to ship, and to know the condition of the market. (Rec., 147.)

There is also an association known as the Traders Exchange, composed of speculators and traders who buy live stock of commission men, members of the defendant

exchange, and sell to commission merchants who are members of the defendant exchange. The commission merchants in buying or selling to the speculators, handle the stock so sold or purchased for others who pay them a commission for the services rendered. (Rec., 187.)

With the single exception of the firm of Greer, Mills & Co., who are temporarily protected by an order of court, no person or company is engaged in the business of handling live stock on commission at the Kansas City stock yards, except members of the exchange. The purpose of the association is and has been to prevent anyone except their own members from doing any such business there. When a new arrival undertakes to engage in the commission business at the stock yards, he is promptly served with a notice similar to the following:

KANSAS CITY, *June 4, 1895.*

Mr. P. H. HARRIS, *City.*

DEAR SIR: I am instructed by the directors of the Kansas City Live Stock Exchange to request that you take out a membership in this exchange forthwith, or cease to carry any party or parties on commission.

Respectfully, yours,

R. P. WOODBURY, *Secretary.*

(Order of the board of directors.) (Rec., 146.)

The same plan was pursued in reference to Miss Jennie Goodwin, who began doing business in the Live Stock Exchange building, at Kansas City stock yards, as a commission merchant to buy and sell live stock for others, on commission. Very soon after she commenced

such business as a commission merchant, she was notified by the secretary of the Kansas City Live Stock Exchange that she must take out a membership or quit doing business as a commission merchant at the Kansas City stock yards. (Rec., 194.)

There can be little question, from the evidence in the case, as to the purposes of the exchange. It is thus described by various witnesses:

> J. F. CHAPIN: It is the purpose of the exchange to *control the business of live stock commission merchants*—that is to say, to compel all persons who do a business at this market on commission to belong to the exchange by taking out certificates of membership therein, and to regulate the method of their doing business by fixing commission charges, and in other matters. It is utterly *impossible* for any person, firm, or corporation to do a live stock commission business at this market without taking out a membership in the exchange. In case a person, or firm, or corporation undertakes to do a commission business at this market without taking out a certificate of membership in the exchange, the members of the exchange decline to do business with them, and their names are *posted on the bulletin boards in the exchange building*, and when so posted the members, under the rules, have to refuse to transact business with the person so posted. I have seen from time to time posters on the bulletin boards giving the names of the parties so posted.
>
> JENNIE M. GOODWIN: I knew that *if I did not take out a membership the members would refuse to buy from me, and I would lose my business.* They did not tell me in so many words that I would have to quit business, but I knew that was what they meant,

and they would have all the members refuse to buy from me, and that I could not, as a woman, single-handed and alone, afford to get the combined exchange against me. I, therefore, soon after the 1st of January, 1896, *quit the business of live stock commission merchant*, and have since that date had an office in the exchange building as a stenographer and notary public. (Rec., 196.)

JAMES H. THOMSON: To prevent anyone other than a member of the exchange *from doing business as a commission merchant*, various methods are employed. One method is under rule 16 of the by-laws of the exchange. When one has refused to join the exchange, or, having joined, withdraws therefrom, the board of directors passes a resolution directing the secretary to *post on the bulletin boards* the resolution or the order of the board, naming the member or firm so refusing, and directing all the members of the exchange to act accordingly. This is understood to mean that they shall refuse to do business or trade with such member so posted. Other methods are to notify by letter each member of the association, and such other parties as they desire to influence, of the action taken by the board. (Rec., 199.)

CHAS. HOWARD: An association known as The Kansas City Live Stock Exchange *controls the business of the live stock commission merchants* for the sale of live stock at this market on commissions. It is the purpose of the Kansas City Live Stock Exchange to *prevent any commission merchant from doing the business of buying and selling, on commission, on this market, unless such commission merchant belongs to the exchange*. If a man or firm try to do a commission business at the Kansas City stock yards without taking out membership in the exchange,

they use different methods for preventing buyers from purchasing the stuff they have to handle. Under rule 16 of the exchange, when a person or firm are posted on the bulletin boards, that is understood to be a *direction from the exchange* to refuse to trade or do business with the member so posted. (Rec., 215.)

SCOTT R. KENNEDY: It is the purpose of the Kansas City Live Stock Exchange, as demonstrated by their practice and custom, to influence all persons who do business at the Kansas City Live Stock Yards *to become members of the exchange*, and as far as possible *prevent* any firm or person from doing a business at this market, as a live stock commission merchant, who does not become a member of the exchange. The methods employed to prevent any person who is not a member from doing business as a live stock commission merchant vary. One method is to *post* such person or firm on the *bulletin boards* of the exchange, informing the other members of the exchange not to do business with the person so posted. (Rec., 212.)

JAMES PLUMMER: When one undertakes to do a business at the Kansas City stock yards of the nature and kind transacted by the commission merchants, that is, either buying or selling on commission, he is *required* to take out a *membership* and become a member of the Kansas City Live Stock Exchange. In affiant's opinion and from his observations of the methods employed by the Kansas City Live Stock Exchange, a person, or firm, or company, could not transact the business of a commission merchant at this market *without taking out a membership in the exchange*. (Rec., 187.)

WILLIAM WINDER: From my experience as a member of the exchange doing business here at the

Kansas City stock yards, and from my observation and knowledge of the methods used by the Kansas City Live Stock Exchange, and their rules and by-laws, I know it is the purpose of the exchange to *prevent any persons from doing business as live stock commission merchants* at this market unless they *belong to the exchange*. They use their rules and by-laws as far as they can to effect their purpose, and supplement the rules by other methods and influence parties to join the exchange, and to *force membership* on all parties acting as commission merchants. (Rec., 160.)

A. J. GILLESPIE: When a person desires to do a commission business at said Kansas City stock yards, *he has to buy a membership and subscribe to the rules of said exchange*. (Rec., 152.) It has been the policy of the exchange to use its influence as far as possible to *compel* all who do a live stock commission business at the Kansas City yards to *become members of the exchange*, so as to make them subject to the rules, and their number and influence is so great they have been able, so far, to bring about the membership in the exchange of all persons so trading, *or to practically prevent their doing business as live stock commission merchants*. While no force is used, the large numbers in the combination and the influence brought to bear by various methods has been effective. (Rec., 155.)

NORMAN B. GREER: When a stock commission man or firm tries to do business as a commission merchant at this market without being a member of the exchange, or having been a member and expelled or withdrawn, the combined influence of all the members of the exchange is used to *put obstacles in the way of his doing any business and preventing the sale by such commission man or firm of any cattle or hogs*

at this market. The method of doing that is by *posting* a notice on the bulletin board or the several boards in the Live Stock Exchange building, which under rule 16 is understood to mean a *direction* to all the members to not transact any business with the member so posted, under the heavy penalties and forfeitures prescribed in the rules; and, in addition to that, they use the moral influence of the entire combination *to prevent them from getting live stock from the country* and in getting the *packing houses* to refuse to purchase cattle or hogs from such commission man or firm. (Rec., 149.)

The membership includes not only commission men, but extends also to the *packing houses.* The packing houses, being corporations, do not hold memberships in their own names, but, as provided by rule 8, the memberships are carried in the names of employees. The memberships in the Armour Packing Company, the Swift Packing Company, the Dold Packing Company, the Fowler Packing Company, and the Schwarzschild & Sulzberger Packing Company are given at page 154 of the record.

The *packing houses* act in harmony with the commission merchants. When a person is posted in accordance with rule 16, the *packing companies*, as required by said rule and the construction given to it, *refuse to do business with such person.*

This may be illustrated by brief references to the record.

A. J. GILLESPIE: The influence of the Kansas City Live Stock Exchange on all the different *packing companies* is such that, if the exchange has posted anyone on the bulletin board as a party or

firm that the members of the exchange should not do business with, under rule 16, the *packing companies* usually refuse to trade with such posted firm or commission man, and it has the effect of *preventing* such posted commission merchant or firm from *selling live stock shipped to the member or firm to the packing houses or companies.* The practical effect of it is to prevent a commission firm or house from handling and selling its stuff in this market to the *packing companies*, or others, where the exchange tries to prevent it. (Rec., 154, 155.)

N. B. GREER: That the *packing houses*, companies, or corporations are not members of the Kansas City Live Stock Exchange, but each of said packing houses, companies, or corporations has representatives who do belong to and are members of the Kansas City Live Stock Exchange; the latter *influences, controls, and exercises authority and power to prevent said packing companies, corporations, and houses from doing business with Greer, Mills & Co.;* that said packing houses, companies, and corporations, although not members of said exchange as such, have during all the periods of time in which said Kansas City Live Stock Exchange was not enjoined by some order of a court of equity *refused* to trade with or buy live stock from affiant's firm, by reason of the *notice and threats of said exchange*, although theretofore they had *freely, and almost daily*, traded with and bought live stock of the firm of Greer, Mills & Co. (Rec., 137.)

JAMES H. THOMSON: The *local packers* are all connected with the exchange through certain representatives of the packing houses being members of the exchange, and through such representative membership, and through the influence of the large numbers belonging to the exchange, are influenced

by the will and direction of the exchange *in dealing with, or not dealing with, such parties*, commission houses and firms as the exchange do business with or are members thereof.

During the period of time that Greer, Mills & Co. were not protected by restraining orders of the courts, the *local packers* were influenced by the exchange *not to trade* with the firm of Greer, Mills & Co., or buy their hogs or cattle. Of the cattle sold at the Kansas City market, nearly all the fat cattle are sold to the local packers for slaughter here, or at their packing houses elsewhere. (Rec., 203.)

All of the commission merchants doing business at the Kansas City stock yards (with the exception of Greer, Mills & Co., who are protected by an injunction, as hereinafter stated) are members of the exchange, defendants herein. (Rec., 160, 185, 187, and 199.)

While, by the fiction of law, the owner can bring his own cattle to Kansas City and sell them on the market without employing a commission merchant, this is true in theory only, since, practically, he is compelled to employ a commission merchant, the shipper, unfamiliar with the intricate methods of doing business at the stock yards, is unable to get his cattle unloaded and cared for; and is also unable to procure a buyer at reasonable figures, since the buyers are all, or practically all of them, members of the exchange, and it is to their interest to require shippers to patronize the exchange.

A few quotations from the record will make this apparent.

A. J. GILLESPIE, a member of the exchange, and one of the defendants: While the owner of

cattle and hogs, theoretically, can bring them to this market and sell them himself, without the aid of a commission man, the methods to be gone through make it very difficult for such owner to get his cattle into and out of the yards and complete the sale of the same. In other words, there is too much red tape for him to get through with, so that the practice is for all shippers from the country to obtain the services of commission men to make their sales for them. While there is no rule directly forbidding commission merchants from buying and selling in the yards, without becoming members of the exchange, yet the rules are so worded, and the *custom and practice* of the exchange has been such as, in effect, to *prevent* them from doing business without becoming *members* of the exchange, and that is the way it is understood by nearly everyone trading there. The intent and purpose of the rules, as they are adopted and promulgated, indirectly accomplish the same purpose, and are so understood in practice (p. 159).

J. B. HARRELSON: I have been in that business (farming and feeding) for more than twenty years. I feed and ship annually from 600 to 1,000 head, and have been doing so for the past two or three years; prior to that time, I did not ship quite so many.

I am familiar with the methods and agencies for handling cattle at the Kansas City stock yards when shipped to those yards for sale. I know that in all my shipments I have *had to employ* the services of commission men to handle my stock in the yards, both in buying feeders at the stock yards and in selling my cattle after they were prepared for slaughter or shipment. When shipping to this market, I always consigned the shipment from my station, at Belton, to a commission firm at the stock

exchange direct, and such commission firm receive, look after yarding and care for the stock in the yards, and find purchasers for the same, and for which they charge a commission of fifty cents per day. If I shipped my cattle to this market, consigned to myself, and came here with them to handle them for myself and save the commission, and made a practice of doing that, I am satisfied I would *not obtain a fair market price*. I would be *ignored* by the buyers, under the influence of the *combined membership of the exchange*, as I had not patronized the commission men in the payment of their fifty cents per day. The object of the commission man being to get this fifty cents per day for selling, and the object of the combination of all the commission men being to enforce regulations requiring the payment of *fixed commission*, I never would be able to handle my own stock in selling the same at this market and get fair play and the market price. I know this from my *experience and observation* in *shipping* to this market and in my experience in dealing with the commission men here.

I believe there should be no restrictions placed in this market that would prohibit the feeder and shipper from making a private agreement either in the purchase or sale of his stock. Under the business as it is now done, and the methods for handling cattle here as they now exist, under the organization of the Kansas City Live Stock Exchange and their relation to the *packers* and *scalpers*, *no feeder or shipper can get along at this market without paying a commission of 50 cents a head for either selling stock shipped here for sale, or for buying the feeders taken to the country to fatten*. (Rec., 193.)

JAMES H. THOMSON: By reason of the complicated character of the sale or purchase of live stock, as the business has grown up at said market, it is

difficult for a person *not acquainted with the yards and the methods of doing business* to go through with all the steps necessary from the time of arrival of the car of stock from the country into the yards, the unloading, putting in pens, feeding, watering, weighing, and delivery to the purchaser, and the closing of the money transaction of settling for same to get through without the aid of some one experienced in the methods of doing business at the stock yards. For that reason *very few, if any*, farmers, stock growers, or feeders who own the cattle in the country and ship them to this market for sale undertake to sell their own cattle or live stock at this market, but employ live stock commission merchants, men located at the stock yards, who are experienced in all the details and methods of doing business at the stock yards, to assist them in handling their stuff as it arrives at the market and selling it for them. (Rec., 206.)

W. M. HURST: I do know that, in those years prior to the organization of the Kansas City Live Stock Exchange, some men *shipped* their cattle here and *sold them themselves*, without employing any commission men, or paying any man for the sale. So far as I know, the shipper has *not* sold his own cattle at this market himself, without the aid of commission merchants and the payment of commission, since the Kansas City Live Stock Exchange was organized. I have talked with different commission men, members of the exchange, since that, and asked them why the shippers did not sell their cattle themselves, in the yards here, without paying commission to the commission men—or, in other words, why it was not practiced by some shippers as it was before the exchange was organized, and they told me that they could not do it; that the shipper could not make a success of it since the organiza-

tion of the exchange as they did before. From my experience in shipping cattle here, and my observation in and about the stock yards here, and my talk with commission men, and familiarity with the methods employed at this market, it is my opinion that a shipper of cattle to this market for sale could not handle his cattle here and make a success in selling them, and obtain the fair market price, without employing and paying some commission merchant or firm to transact the business. The commission men belonging to the exchange are so numerous, and by reason of the customs, rules and regulations of the buyers and sellers, it has been, and is now, in my opinion, an impossibility to realize the full market price for stock shipped to this market without the employment of commission merchants to do the business. (Rec., 232.)

Rule 16 of the defendants, as construed by them, in the language of the lower court, "shuts out all dealing and business intercourse between members and non-members of the association. It is shown beyond cavil that *the entire membership of the association regards a commission merchant attempting to do business at the Kansas City stock yards without joining the exchange, as one violating this rule, and treats him accordingly.*"

This construction is amply indicated from the affidavits, as follows:

WILLIAM WINDER: One of the methods of bringing about such a boycott, or preventing members of the exchange, or any one under the influence of the exchange, from trading, is done through rule 16. The board of directors of the exchange pass an order that the party that they direct their antagonism against shall be posted on the bulletin board, and this order is carried out by the secretary

posting the bulletins on the several boards of the exchange building, the name of the party, and that such party, if a member of the exchange, has been fined or suspended or expelled, as the case may be, or that such party is not a member of the exchange, and for the members to govern themselves accordingly. This is taken to mean, by the members of the exchange, that they are not to transact any business with any such party so posted, and they carry out the order by refusing to trade, and by influencing, as far as they can, others that are not members of the exchange. (Rec., 161.)

JAMES PLUMMER: If a man undertakes to sell on commission, without taking out a membership in the exchange, complaint is made to the Kansas City Live Stock Exchange, and the members of said exchange influence one another, and influence the members of the Traders' Exchange not to deal with them, to quit buying, trading, and selling to them, and in that way they are shut out of business. I know it is considered against the rules of the Kansas City Live Stock Exchange to permit any persons to do a commission business at this market without their being members of the Kansas City Live Stock Exchange. The large number belonging to the exchange, through their combined influence, exercise a great power in preventing a person or firm in doing business here whom they do not want to do business. One of the methods of giving directions and notice to the members of the exchange and others that a person is trading in violation of the rules, or is doing business without belonging to the exchange, is by posting up notices on the bulletin boards. These bulletin boards are put up in conspicuous places in the halls of the exchange building. Members and other traders at this market, seeing such notices posted up, understand that

no trading is to be done with such posted person or firm while the exchange is against such person trading. They know by said posting that it is the will of the exchange, through its officers and members, that such person so posted, shall, as far as possible, be prevented from trading or doing business in that line.

In each instance, affiant knows that the combined effort of the exchange, when so directed against such person or firm, has been sufficient to materially damage the business or entirely prevent the business of such person or firm antagonized by the exchange. (Rec., 188, 189.)

J. F. CHAPIN: Under the articles of association, rules, and by-laws of the exchange, and the interpretation placed thereon by members of the exchange, and the methods and customs of doing business here, it is utterly impossible for any person, firm, or corporation to do a live stock commission business at this market without taking out a membership in the exchange. In case a person, firm, or corporation undertakes to do a commission business at this market without taking out a certificate of membership in the exchange, the members of the exchange decline to do business with him, and his name is posted on the bulletin boards in the exchange building, and when so posted, the members, under the rules, have to refuse to transact any business with the person so posted. I have seen from time to time posters on the bulletin boards, giving the names of parties so posted. From my experience here at the stock yards, I know it would be useless for a man to come here and engage in the commission business without being a member of the Kansas City Live Stock Exchange. (Rec., 197.)

JAMES H. THOMSON: For some years the Kansas City Live Stock Exchange have tried to control the entire business of buying and selling live stock on commission at the Kansas City stock yards market; that, in effect, the exchange has prohibited anyone from doing a commission business in the purchase and sale of live stock who refuses to become a member of the exchange. To prevent anyone other than a member of the exchange doing business as a commission merchant, various methods are employed. One method is under rule 16 of the by-laws of the exchange; when one has refused to join the exchange, or, having joined, withdraws therefrom, the board of directors pass a resolution, directing the secretary to post on the bulletin boards the resolution or the order of the board, naming the member or firm so refusing, and directing all the members of the exchange to act accordingly. This is understood to mean that they shall refuse to do business or trade with such member so posted. (Rec., 199.)

As a further instance of the construction placed by the members upon rule 16, the case of Greer, Mills & Co. will now be stated.

On November 16, 1896, the firm of Greer, Mills & Co. served upon the Kansas City Live Stock Exchange a written notice of withdrawal from said exchange, a copy of said notice being set out, being as follows (Rec., 213, 214):

To The KANSAS CITY LIVE STOCK EXCHANGE,
Kansas City, Kans.

You are hereby notified that Frank O. Mills, J. E. Greer, and Jesse Sherwood, all of Chicago, Illinois, composing the undersigned firm of Greer, Mills &

Co., do hereby withdraw from membership in the Kansas City Live Stock Exchange, and do hereby surrender and deliver to you certificates of membership in said exchange, being numbers 241, 59–A, and 60–A.

You are further notified that the undersigned hereby withdraw their consent formerly given to the "Articles of association, rules, and by-laws, and rules for inspection of hogs of the Kansas City Live Stock Exchange," and to each and every part and section thereof.

(Signed) GREER, MILLS & CO.

KANSAS CITY, MO., *Nov. 9, '96.*"

At the time of the surrender of said memberships, Greer, Mills & Co. were members in full standing in said exchange, the notice or prior suspension having been revoked by an order emanating from the Federal court at Kansas City. (Rec., 238.)

The resignation or withdrawal of said Greer, Mills & Co. was accepted on November 17, 1896, by the exchange. (Rec. 214.) After said voluntary withdrawal of Greer, Mills & Co., the exchange, on November 17, 1896, caused notices to be posted on the bulletin boards of the exchange, a copy of which is set forth at page 214 of the record, and also caused copies of the notices to be served on the commission houses doing business at the Kansas City stock yards, the purpose of the notice being to enforce and make effective rule 16.

Immediately after the posting of said notice, the members of the Kansas City Live Stock Exchange refused to deal with said firm of Greer, Mills & Co., and the packing houses refused to buy stock from them, and the exchange doctor refused to doctor hogs, and continued to

do so until about the 5th day of December, 1896, when Greer, Mills & Co. obtained a temporary restraining order from the court of common pleas in Kansas City, Wyandotte County, Kans. Between the 17th day of November, 1896, and the 5th day of December, 1896, the said firm of Greer, Mills & Co., although not members of the exchange, were practically shut out of the market at Kansas City, as far as dealing with any packing house or member of the exchange was concerned. (Rec., 213.)

It amply appears from the affidavits, that during the time that Greer, Mills & Co. were suspended from membership, and also when they had withdrawn from membership, and were not protected by an order of court, it was impossible for them to pursue their business of commission merchants at the stock yards. The packing houses refused to buy from them, and the commission merchants, defendants herein, refused to have any dealings whatever with them. They suffered great pecuniary loss, being compelled to reship stock consigned to them, to Chicago or St. Louis, or to turn it over to some other commission firm to sell, paying them full commissions therefor.

A few instances recited in the affidavits will make this fact plainly apparent.

> R. T. Bass, a member of the exchange, and one of the defendants herein: During such periods of time as Greer, Mills & Co. were suspended for nonpayment of a fine, and during the period of time since they withdrew their membership from the exchange and ceased to be members of the Kansas City Live Stock Exchange, as a general rule the packing houses and the speculators refused to purchase from me as the representative of Greer, Mills

& Co. During the time that restraining orders from the courts were in force the most of them did purchase from me, and are purchasing from me now. During the period of time that Greer, Mills & Co. were not having trouble with the Kansas City Live Stock Exchange I had no trouble in selling hogs for them to the various packing houses and the shippers and speculators, when we had the kind and quality each purchaser wanted. (Rec., 162.)

Detailed statements, showing the experience of Mr. N. B. Greer in a vain endeavor to make sales of commission goods, during the time that the firm of Greer, Mills & Co. were posted, are given in the record, pages 138, 139, 140, 141, 142. Various letters were received by Greer, Mills & Co. from their customers, of which the following is a sample (Rec., 143):

GREENWOOD, MO., *Sept. 14, 1896.*

GREER, MILLS & CO.,
Kansas City Stock Yards.

GENTLEMEN: It is common talk here that you are out of business, having been boycotted by the exchange trust. Fearing the power of their boycott I do not think it will be safe for me to consign my hogs to you, so do not think hard of me if I go to other parties.

Hoping that you will be successful in your fight against the trust, so I can come back to you with my trade, I am,

Yours respectfully,

J. A. MCKITTERICK.

Other letters and telegrams are set forth in record, pages 143 and 145.

A. S. GILLESPIE (a member of the exchange, and one of the defendants): I saw a notice posted

on the bulletin board of said exchange, about November 17, 1896, notifying members that Greer, Mills & Co. had withdrawn from the exchange, and giving notice that the members of the exchange must govern themselves accordingly. Our firm was also served with a copy of the notice. There was also a copy left at our office. After this notice was served it was my understanding that I, or our firm, could not do business with Greer, Mills & Co. without being liable to the penalty of a fine or suspension from the exchange.

Prior to that time our firm had been trading a good deal with Greer, Mills & Co., buying and selling stock hogs and cattle; I think mostly cattle. Since the notice was served upon us we have done no trading with them, either buying or selling, from them. Our relations with Greer, Mills & Co. have always been pleasant, and our dealing with them satisfactory, and the only reason we can not trade with them is because of the notice served on us by the secretary of the exchange. Under the custom and practice of the exchange, as provided in the rules and regulations, as I understand them, we would be liable to a fine of $500 for every offense if we traded with Greer, Mills & Co., and in case of two or more violations, we might be expelled from the exchange.

This notice served on us virtually shuts Greer, Mills & Co. out of the market, so far as we are concerned, as we can not afford to do business with them. I have talked with several members of the exchange since the notice aforesaid, and they have stated that they did not trade with Greer, Mills & Co. It is a fact notorious and well-known among the members of the exchange, and notorious among parties trading there on this live stock market, that

Greer, Mills & Co. are being boycotted in their trade by all, or nearly all, of the members of the exchange.

At this time they are now doing business, and we are trading with them because of restraining order from the court of common pleas of Wyandotte County, Kans., issued against the exchange and its members, preventing them from refusing to trade or do business with that firm by reason of the combination or association, and preventing the exchange from enforcing rule 9 (16) against them. (Rec., 153.)

JAMES PLUMMER: Affiant has often read notices posted up on the bulletin boards in the exchange building, wherein the attention of the members of the exchange was called to the rules prohibiting trade with the person or firm named in such posted notice; and from the interpretation given by the members themselves affiant knows that this is the way they give notice to members and others that the rules require them not to trade or do business with them. (Rec., 190.)

JAMES H. THOMSON: In the case of Greer, Mills & Co., after they had surrendered the membership certificates of each and all the members of the firm, and had ceased to be members of the Kansas City Live Stock Exchange, the board of directors passed a resolution and order, directed to the secretary to post the names of Greer, Mills & Co. on the bulletin boards, and directing each and all the members not to do business with them, and from the time of such posting the members of the exchange exerted their influence with members and others to prevent them from carrying on the business of live stock commission merchants, and would continue to do so but for the protection of the courts through restraining orders or injunctions. (Rec., 205.)

The commissions charged, in accordance with rule 9 of the exchange, are substantially 50 per cent of the commissions charged prior to the organization of the exchange. This is apparent from the record, as follows:

EDWIN E. WILSON: From 1881 to 1886 I was engaged in the cattle business, and shipped and sold at the Kansas City Live Stock Exchange from 5,000 to 10,000 head a year. During those years I made arrangements to receive rebates of 25 cents per head from John R. Stoller & Co., A. J. Snider & Co., Quinlan & Co., and had offers from numerous other commission merchants to handle our cattle at the yards at a commission not to exceed 25 cents per head. It was notorious that the average solicitor for commission firms at Kansas City would rebate on commission to at least 25 cents per head. Regular soliciting agents were stationed at Dodge City, Caldwell, and Kiowa, Kans., for the purpose of soliciting with shippers. Under the active competition of these solicitors it is very doubtful if any of the commissions realized on the sales of cattle were in excess of 25 cents per head, except where commission firms had made loans to cattle shippers, it being always an understood and implied condition of a contract for a loan that the commission merchants making the loan were to sell the cattle and receive the maximum commission of 50 cents per head. Outside of particular instances where loans were made, commissions were largely matters of competition. (Rec., 229.)

JOHN LAWRENCE: I am a shipper of live stock to the Kansas City market, and have been for the past twenty-five years. Prior to the organization of the Kansas City Live Stock Exchange it was the custom and practice for the shipper and the commission

merchant to whom the shipment was made to make such bargain as they could agree upon as to the rate of commission to be charged for selling stock. During all the time prior to the organization of the Kansas City Live Stock Exchange the commission paid by him to live stock commission merchants for selling his cattle averaged about 25 cents per head, or about one-half of the rate charged at the present time and since the organization of the exchange. (Rec., 230.)

W. M. HURST: I have been a shipper of live stock to the Kansas City stock market for twenty years or more. Prior to the organization of the Kansas City Live Stock Exchange in 1886 the rates of commissions of commission merchants at Kansas City were whatever the shipper and commission merchant agreed upon. During all the time of shipment, prior to the organization of the Kansas City Live Stock Exchange, I had offers from or could have had agreements with commission men to sell the cattle I shipped here for 25 cents per head as commissions for their services, and a good many cattle were sold for me at 25 cents per head commission. If the cattle shipper in those days, prior to the organization of the exchange, shipped his cattle to this market without a previous agreement concerning the rate of commission and without being tied up with any kind of a contract for a loan or otherwise it is my opinion that he could have procured the services here of competent commission men to make his sales at 25 cents per head for cattle. (Rec., 231.)

N. B. GREER: Prior to the organization of the exchange the commission merchants made such agreement as to the price of commission as they pleased with their customers. While the nominal

supposed charge, as generally understood among commission merchants, was 50 cents per head for cattle, the actual facts were they made agreement with their country customers for commissions largely based upon the amount of business the country customer would furnish them, and it was usual and customary to rebate 25 cents per head for cattle, which would be one-half of the commission as shown on the account sales rendered by the commission man to his country customers. (Rec., 236.)

WM. P. GOODE: Prior to the organization of the Kansas City Live Stock Exchange I was a shipper to the Kansas City market, and have been for twenty years. Prior to this organization it was the custom and practice for the shipper and commission merchant to whom the shipment was made to make such bargains as they could agree upon as to the rate of commission to be charged; that, while the supposed charges for commissions were 50 cents per head for cattle and 85 per carload for hogs, affiant sold his cattle through commission men for 25 cents per head, or rather procured a rebate of 25 cents per head on cattle and $1 on hogs per carload. The rate of commission on both hogs and cattle depended a great deal on the volume of business, and where the shipper had any considerable amount of stock to sell it was usually the custom to sell them as low as 25 cents per head for cattle and $4 per carload for hogs. (Rec., 249.)

JOHN O. BOGGS: Resides at Lees Summit, Mo., and has been a shipper to the Kansas City market for twenty-five years. Prior to the organization of the Kansas City Live Stock Exchange it was the custom and practice for the shipper and commission merchants to whom a shipment was made to make such bargain as they could agree upon as to the rate

of commission to be charged for selling said stock, both hogs and cattle; that, while the supposed charges for commission were 50 cents per head for cattle and $5 per carload for hogs, affiant sold his cattle through commission men for 25 cents a head and $2.50 rebate for hogs per carload. The rate of commission on both hogs and cattle depended a great deal upon the volume of business, and where the shipper had a large amount of stock to sell it was the custom and practice to sell them as low as 25 cents per head for cattle and $2.50 per carload for hogs. Affiant knows it was a common thing for commission men to rebate 25 cents per head for cattle. (Rec., 250.)

DANIEL WHITING: Resides at Lees Summit, and has been a shipper to the Kansas City market for twenty years. Prior to the organization of the Kansas City Live Stock Exchange it was the custom and practice for the shipper and commission merchant to whom his shipment was made to make such bargain as they could agree upon as to the rate of commission for selling both cattle and hogs. While the supposed charges for commission were 50 cents per head for cattle and $5 per carload for hogs, affiant sold his cattle through commission men for 25 cents a head and $2.50 for hogs per carload. Affiant knows it was a common thing for commission merchants to rebate 25 cents per head for cattle and $2.50 per carload for hogs. (Rec., 252.)

It also appears from the evidence (Rec., 187) that both the speculators and traders purchase from the commission men and do not purchase directly from the owner or shipper.

The affidavits filed by complainants speak for themselves, and the court is respectfully referred to the language of the affidavits as a complete vindication of the

charge that they consist largely of "conclusions, vituperative denunciations and hearsay."

It is scarcely to be expected that affidavits will be absolutely free from the statement of conclusions or even irrelevant matter, since there is no judicial officer interposed to pass upon the character of the testimony. That the complainant's affidavits may be subject to this criticism is not denied. What we are relying upon is the competent and not the incompetent testimony. In the respect complained of, however, we most emphatically assert that the complainant's affidavits are far superior to those of the appellants, as the court will find by the most casual observation.

While complaining of the irrelevant matters injected into the affidavits, appellants have seen proper to relate their version of prior controversies between the exchange and Greer, Mills & Co. Even in this respect we would not complain if the matter had been stated with any degree of fairness or accuracy. Since they have stated their side of this controversy, which we believe to be irrelevant, it may not be unfair to state the other side, which we concede to be equally irrelevant.

The directors of the exchange employed detectives for the purpose of convicting someone of breaking the rules in respect of commissions. The detectives made decoy shipments of cattle, and reported that an employee of Greer, Mills & Co. had broken the rule by paying a rebate of $6. It was not claimed that any member of the firm of Greer, Mills & Co. or their manager or cashier had any knowledge whatever of the transaction.

There was the form of a trial before the directors, who combined in one body the functions of secret service, prosecuting attorneys, and the judiciary. It is not surprising, therefore, that there was a form of conviction, although none of the members of the firm of Greer, Mills & Co. had any knowledge or notice of the extraordinary proceeding until it culminated in a so-called conviction. Possibly some such form of proceeding was necessary in order to make an example of someone and so maintain the high standard of "moral principles." It may be that it was fate which selected Greer, Mills & Co. as the victim. It certainly is true that Greer, Mills & Co. assert that, so long as they belonged to the exchange, they complied with its rules in every respect.

It is also true that suit was brought in the circuit court of Wyandotte County, Kans., by Greer, Mills & Co., in which the position was taken that the by-laws were unlawful. They were sustained in that position (*Greer* v. *Payne*, 46 Pac. Rep., 190), but the court denied them relief on the ground that they were still members of the association. Greer, Mills & Co. thereupon served a notice upon the exchange withdrawing their consent to the rules declared to be illegal, which notice is at page 134 of the record, and they thereupon instituted an action (*Greer* v. *Stoller*, 77 Fed. Rep., 1) in which it was held that the "court could not proceed to judgment in the action for the want of jurisdiction over all the necessary parties to a full and final determination." They thereupon, and while, by virtue of the restraining

order, in full membership and entitled to all the privileges of membership, withdrew from the association, and their withdrawals were accepted on November 17, 1886. (Rec., 186.) That the appellants so considered it is apparent from their answer, where it is stated that they "subsequently voluntarily withdrew from said exchange."

It is stated by appellants, at page 27 of their brief, that rebuttal affidavits were filed "during the hearing without any previous knowledge of their contents or existence on the part of the defendants." This we most emphatically deny. Counsel has doubtless forgotten that this question was raised at the hearing, and it was shown to the satisfaction of the court that his co-counsel had for some time been made aware of the existence of the affidavits, and had had an opportunity to examine them and to reply to them if desired. While neither this statement nor its denial appears in the record, the fact remains that the affidavits were admitted by the lower court; and the presumption will be indulged, in accordance with the actual fact, which is that they were properly admitted on the showing of due notice. (*Van Slone* v. *Manufacturing Company*, 142 U. S., 128.)

Upon the hearing a temporary injunction was granted. The opinion of the court will be found at page 259 of the record.

BRIEF AND ARGUMENT.

I.

THE BY-LAW OF THE DEFENDANTS WHICH PROHIBITS THE SENDING OF PREPAID TELEGRAMS IS A RESTRAINT OF TRADE OR COMMERCE AMONG THE SEVERAL STATES.

Section 11 of article 9 of the rules and by-laws of the Kansas City Live Stock Exchange is as follows:

> SEC. 11. Any member of this association, or firm or corporation represented herein, sending or causing to be sent a prepaid telegram or telephone message quoting the markets, giving information as to the condition of the same, shall be fined not less than $100 nor more than $500. If said fine be not paid within three days, said firm or member shall be suspended until said fine is paid:
>
> *Provided, however*, That prepaid messages may be sent to shippers, quoting actual sales of their stock on the day made; also to parties desiring to make purchases on this market.

The purpose of this section is to *prevent the sending* of prepaid telegrams by the defendant commission men to their various customers in the twenty-four States and Territories tributary to the Kansas City market. A prepaid message may be sent to shippers quoting actual sales of their stock on the day made, but *not otherwise*. This section is a part of the contract between the members of the exchange, and is clearly an attempt to regulate and restrict the sending of messages by telegraph and telephone between citizens of various States and Territories, and *operates upon and directly affects interstate business*. The purpose of the section doubtless is to restrain com-

petition among the members, and so to prevent the active and energetic from acquiring an advantage over the others.

The transmission of messages by telegraph lines from one State to another is held by the Supreme Court to constitute interstate commerce. Any attempt on the part of the State authorities to *limit, regulate, restrict, or burden such transmission of interstate messages has been uniformly held to be entirely inoperative and void*, as repugnant to that clause of the Constitution which gives to Congress authority to regulate commerce among the States.

In *Leloup* v. *Port of Mobile* (127 U. S., 640) an ordinance was passed which provided "that the license tax for the year from the 15th of March, 1883, to the 15th of March, 1884, be, and the same is hereby, fixed as follows: * * * Telegraph companies, $225." The court held that the ordinance was *void*, as an attempt to regulate interstate commerce, saying (p. 645):

> Now, we have decided that *communication by telegraph is commerce*, as well as in the nature of postal service, and if carried on *between different States* it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and *free from the control* of State regulations, except such as are strictly of a police character. * * *
>
> In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subject of that commerce, or on the receipts derived from that transportion, or on the occupation or business of carrying it on, and the reason is that such taxation is a *burden on that com-*

> *mere*, and amounts to a *regulation of it*, which belongs *solely* to Congress. This is the result of *so many recent cases* that citation is hardly necessary.

It is very clear that none of the States or Territories to which the business of the defendants extends could enact any law intertering with or *abridging the rights of persons in Kansas or Missouri to send prepaid telegrams*. If we can concede such a law to have existence, it would not only be repugnant to the commerce clause of the Federal Constitution, but would also interfere with the inherent right possessed by every citizen to *make such contracts* in the conduct of his business as, not being unlawful, should seem to him requisite and necessary in its conduct.

If a State, by its legislature, or a municipality, by its council, is unable to burden interstate commerce or place any restriction upon it, or regulate it in any manner, it is difficult to see how this may be done *by agreement among members of a voluntary association*. To concede such a right would be to grant to an association of individuals powers in the restriction and regulation of interstate commerce which are denied to sovereign States.

The power to regulate necessarily implies the power to destroy. If they have the right to restrict telegraph messages between States to *prepaid messages*, they would also have the right to *prevent* the sending of telegrams entirely. This is aptly illustrated in the case last cited, where the court says (p. 645):

> Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege?

> *If it can, it can exclude such companies, and prohibit the transaction of such business altogether.* We are not prepared to say that this can be done.

In *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (96 U. S., 1) the statute of Florida granted to the Pensacola Telegraph Company the exclusive right of establishing and maintaining lines of electric telegraph as therein specified. This act was held to be *void*, as an attempt to usurp the power of Congress to regulate commerce between the States.

The court says (p. 12):

> The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is therefore *inoperative* as against a corporation of another State entitled to the privileges of the act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose.

In *Telegraph Company* v. *Texas* (105 U. S., 460) a statute of the State of Texas contained the provision that every chartered telegraph company doing business in the State should be required to pay a tax of 1 cent for every full-rate message sent and one-half cent for every message less than full rate. The act was held to be *void*, as an attempt to *regulate commerce*.

Mr. Chief Justice Waite, speaking for the court, used the following language (464):

> *In Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (96 U. S., 1) this court held that *the*

telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to *their foreign and interstate business*. A telegraph company occupies the same *relation to commerce*, as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are *instruments of commerce*, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

After reviewing the case of the *State Freight Tax* (15 Wall., 232), the court continued (p. 465):

> The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the prices charged. It is in no respect proportioned according to the business done. If the message is sent, the tax must be paid and the amount determined solely by the class to which it belongs. If it is full rate, the tax is 1 cent, and if less than full rate, one-half cent. Clearly, if a fixed tax for every 2,000 pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on *private messages sent out of the State*, it is a *regulation* of foreign and *interstate commerce* and beyond the power of the State. That is fully established by the cases already cited.

In *Western Union Telegraph Co.* v. *Pendleton* (122 U. S., 347) the statutes of the State of Indiana required telegraph companies to deliver dispatches by messenger to

the person to whom the same were addressed or to their agents, provided they resided within 1 mile of the telegraphic station or within the city or town in which such station was located. It was held that such statutes were in conflict with the clause of the Constitution of the United States which vests in Congress the power to regulate commerce among the States, in so far as they attempt to regulate the delivery of such dispatches at places situated in other States.

It was also held that the authority of Congress over the subject of commerce by telegraph with foreign countries or among the States was supreme, and that *no State could impose any impediment on its freedom by attempting to regulate the delivery in other States of messages received within its own borders.*

The court says (p. 358):

> In these cases the *supreme authority of Congress* over the subject of commerce by the telegraph with foreign countries or among the States is affirmed, whenever that body chooses to exert its power; and it also held that the States can impose no *impediments* to the *freedom* of that commerce. In conformity with these views the attempted regulation by Indiana of the mode in which messages sent by telegraph companies doing business within her limits shall be delivered in other States *can not be upheld.* It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose, as the imposition of a tax by the State of Texas upon every message transmitted by a telegraph company within her limits to other States was beyond her power. Whatever authority the State may possess

over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other States.

The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, *uniform regulations*, where such uniformity is practicable, *against conflicting State legislation*. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different States, *if each State was vested with power to control them beyond its own limits*. The manner and order of delivery of telegrams, as well as of their transmission, would vary according to the *judgment of each State*. Indiana, as seen by its law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order; but that all other messages shall be transmitted in the order in which they are received; and punishes as an offense a disregard of this rule. Her attempt, by penal statutes, to enforce a delivery of such messages in other States, in conformity with this rule, could hardly fail to lead to *collision with their statutes*. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in cases of fire or other calamity, and telegrams respecting the sickness or death of relatives.

Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within 1 mile of the telegraph station, or within the city and town in which

> such station is; and the requirement applies, according to the decision of its supreme court in this case, when the delivery is to be made in another State. *Other States* might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within *less limits;* but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of *conflicting laws*, both of which he could not obey. *Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any State.*

It is, of course, true that a State has the right to regulate its commerce which is wholly internal. It has the right to create and regulate a telegraph line which is entirely within its borders, and presumably the right to tax business done entirely within the State. Such is held to be the rule in *Postal Telegraph Co.* v. *Charleston* (153 U. S., 692). The State has also the right, as an exercise of the police power, to pass a law regulating the delivery of messages after they have been received within the State. Such a law is a valid exercise of the police power, which operates upon the message after it has been received within the State and after it has ceased to be a subject of interstate commerce. Such was the rule in *Western Union Telegraph Co.* v. *James* (162 U. S., 650).

Under the authorities, there can be no question about communication by telegraph from one State to another being "commerce among the several States;" and in the case at bar there can be no question that telegrams sent from the Kansas City stock yards by the defendants to

their various customers throughout the Western States are subjects of interstate commerce. If the rules and by-laws of the Kansas City Live Stock Exchange amount to "a contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce," a subject to be hereafter considered, then, beyond any doubt, they operate upon commerce between the States.

Congress has left the subject of telegraphic communication entirely free from any restrictions of its own, and so has impliedly declared that there shall be no restrictions placed upon such commerce, and that it shall be free from any burdens whatsoever. It has impliedly said that *dealers and traders shall have the right to communicate with each other by interstate messages, without any restriction or burden or regulation.*

Congress has gone one step further, and has declared affirmatively, by the act of July 2, 1890, *that in commerce of this class there shall be no "restraint."* The freedom from restraint as to interstate trade and commerce, by this act, *is coextensive with the Federal power.*

It is too plain for argument that if the State of Missouri or the State of Kansas were to pass an act *prohibiting prepaid telegrams to other States quoting the condition of the market* such an act would be *void*, as repugnant to the Federal Constitution, which reserves to Congress the right to regulate interstate commerce. If *Kansas* should pass a law that no interstate telegram should be sent unless it be prepaid, *Nebraska* would equally have the right to pass a law that no telegram should be received in that State unless it were sent "collect"; and the effect would be that *telegraphic communication* between the

States of Kansas and Nebraska would be *impossible*. It was to prevent the possibility of such conflicting State legislation that power and authority over interstate commerce were lodged in the General Government.

If the *members of the Kansas City Live Stock Exchange* have the right to agree among themselves that none but prepaid telegrams shall be sent to their various correspondents throughout the Western country, the *stock raisers throughout Colorado, New Mexico, and other Western States* would equally have the right to form a combination which should provide that they would deal with no stock yards association which did not send them daily reports of the condition of the market *by prepaid telegrams*. If such combinations were made, it would follow that *interstate commerce between the stock growers and stock commission men* would be thrown into the greatest *confusion*, if not *prevented* altogether. Interstate commerce would be burdened, hampered, and restrained, instead of being open and free and without restriction, as Congress, both by its nonaction in respect to interstate telegrams as well as by its positive legislation against restraints and monopolies has declared it shall be.

We are unable to see any escape from the conclusion that the section of the by-laws above quoted is in the very teeth of the act of July 2, 1890.

While this question was urged upon the court below and decided adversely to the appellants, it is a significant fact that they, from the beginning of this litigation to the present time, have been unable or unwilling to answer the question here presented.

II.

THE BY-LAW OF THE DEFENDANTS LIMITING THE NUMBER OF SOLICITORS THAT MAY BE EMPLOYED IS "IN RESTRAINT OF TRADE OR COMMERCE AMONG THE SEVERAL STATES."

Section 10 of rule 9 of the rules and by-laws of the Kansas City Live Stock Exchange is as follows:

> SEC. 10. No agent, solicitor, or employee shall be hired except upon a stipulated salary, not contingent upon commissions earned (save as provided in section 2 of this rule. No solicitor shall be employed except as a *bona fide* traveling agent, who shall not solicit consignments *local to his own neighborhood only* nor to secure his *individual trade*. Nor shall any agent, solicitor, or employee be hired *who is employed by any other party or parties* or who is *actively engaged in other business* (save as provided in section 2 of this rule). Members of this exchange must file with the secretary, within five days of employment, the names and addresses of their solicitors. *More than three solicitors shall not be employed at one time by a commission firm or corporation.* Members of a commission firm or corporation—resident or nonresident of Kansas City—may travel as solicitors, but must be registered *as one of the three allowed each firm or corporation.* It shall be a *violation* of this rule for any solicitor representing or claiming to represent a commission firm or corporation in any other market to solicit for any Kansas City firm; and members shall be held accountable for the acts of any solicitor who, under the guise of soliciting for a branch house, solicits for a Kansas City firm or corporation.

This section, in reference to the employment of solicitors by commission men in the stock yards, is clearly an unlawful attempt to regulate interstate commerce. The solicitors, as their name implies, are employees of the various commission houses, who travel to distant States and Territories and there solicit shipments to be sent to their employers in Kansas City, in order that their employers may realize commissions for making sales, collect from the proceeds of the sale moneys advanced, etc.

No reason is perceived why one of the defendants may not contract with its solicitor so that his compensation shall be contingent upon commissions earned, unless the object be to prevent rivalry and competition among the solicitors. For some reason it appears to have been deemed advisable to suppress *the dominating principle of self-interest among solicitors.*

It is also provided that no traveling agent shall solicit consignments local to his own neighborhood. This is apparently another effort to prevent the healthy flow of free competition. Its effect is to deprive the members of the advantage which might be derived by some who, actuated by ordinary business motives, would seek to increase their business by employing solicitors from the locality where trade is sought.

Again, members are prevented from employing as a solicitor any person who is employed by any other party or parties or who is actively engaged in other business. This is another restraint upon the *right to contract*, and prevents the solicitor from offering his services to the person who will pay the most for them.

The most vicious provision in the rule is the one *prohibiting the employment of more than three solicitors by a commission firm or corporation.* The business of commercial travelers, traveling salesmen, and solicitors is declared by the Supreme Court to constitute *interstate commerce.* Such commerce must remain free from any State legislation and free from the control or restraint by any person or combination of persons. The rule in this respect is also an unlawful inhibition upon the privilege possessed by each person under the Constitution to make *lawful contracts in furtherance of his business.* In this respect the members have surrendered their dominion over their own business and permitted the directors to establish a species of regency. That they have no right *to abdicate control over their business and commit its management to other persons will be considered hereafter.*

There can be little or no question that the by-law in regard to the employment of solicitors is one which directly affects interstate commerce.

In *McCall* v. *California* (136 U. S., 104) the New York, Lake Erie and Western Railroad Company established an agency of that line in San Francisco, for the purpose of inducing passengers going from San Francisco to New York to take that line from Chicago to New York, but the agent was not engaged in selling tickets for the route or receiving or paying out money on account of it. It was held that *this agency* was engaged in *interstate commerce,* and that a license tax imposed upon the agent for the privilege of doing business in San Francisco was a tax upon interstate commerce, and was unconstitutional.

After citing authorities, the court says (p. 108):

Tested by these principles and definitions, what was the *business* or *occupation* carried on by the plaintiff in error on which the tax in question was imposed? It is agreed by both parties that his business was that of *soliciting passengers to travel over the railroad which he represents as an agent*. It is admitted that the travel which it was his business to solicit is not from one place to another *within the State of California*. His business, therefore, as a railroad agent, had no connection, direct or indirect, with any *domestic commerce* between two or more places within the State. His employment was limited exclusively to inducing persons in the State of California *to travel from that State into and through other States to the city of New York*. To what, then, does his agency relate except to *interstate transportation of persons?* Is not that as much an agency of interstate commerce as if he were engaged in soliciting and securing the transportation of *freight* from San Francisco to New York City over that line of railroad? If the business of the New York, Lake Erie and Western Railroad Company in carrying passengers by rail between Chicago and New York and intermediate points, in both directions, is interstate commerce, as much so as is the carrying of *freight*, it follows that the soliciting of passengers to travel over that route was a part of the business of securing the passenger traffic of the company. The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the *means* by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not *incidentally* or *remotely* connected with the business of the road, but was a *direct method of increasing that business*. The tax upon it, therefore, was, according

to the principles established by the decisions of this court, a tax upon a means or an *occupation* of carrying on interstate commerce pure and simple.

The employment of solicitors in this case is for the purpose of procuring the shipment of cattle from twenty-four States and Territories to the Kansas City stock yards. If it is interstate commerce to solicit *passengers* to travel over a railroad in a distant State or States, may not *the solicitation of shipments of cattle from one State to another be equally denominated interstate commerce?*

The regulation of such commercial travelers or solicitors belongs alone to the domain of Federal legislation. No State has the power to in any manner interfere with any of the various *solicitors of the defendants* while engaged in the various States and Territories in soliciting shipments of cattle for consignment to Kansas City.

In *Asher* v. *Texas* (128 U. S., 129) it is held that—

> A State law exacting a license tax to enable a person within the State to *solicit orders and make sales* there for a person residing within another State is repugnant to that clause of the Constitution of the United States which gives Congress the power to regulate commerce among the several States, and is *void*.

The act of the legislature in the case just quoted provided that there should be levied and collected "from every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of $35, payable in advance;" and this act was held to be void as a regulation of interstate commerce.

In *Robbins* v. *Shelby County Taxing District* (120 U. S., 489), the following act of the legislature of the State of

Tennessee was held to be void as contravening the constitutional provision in reference to the regulation of interstate commerce:

> All drummers and all persons not having a regular licensed house of business in the taxing district of Shelby County, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege.

The court says (p. 497):

> It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce can not be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax* (15 Wall., 232). *The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant can not be taxed there for ordering goods from London or New York, because in the one case it is an act of foreign and in the other of interstate commerce, both of which are subject to regulation by Congress alone.*
>
> *State* v. *Scott*, 39 S. W. Rep., 1.
> *Baxter* v. *Thomas*, 46 Pac. Rep., 479.
> *McNaughton* v. *McGirl*, 49 Pac. Rep., 651.
> *Gunn* v. *Sewing Machine Co.*, 20 S. W. Rep., 591.
> *Miller* v. *Goodman*, 40 S. W. Rep., 718.

We must conclude from the foregoing cases that a person engaged in business in the State of Missouri or

Kansas has the absolute right, under the Constitution of the United States, *to send his solicitors and traveling men into distant States and Territories for the purpose of securing interstate business.* Whether that business consist in securing shipments of cattle from distant States and Territories to the Kansas City stock yards, or in routing passengers over some railroad to a distant State, the same principle applies. In each case it is commerce among the States, and Congress, not only by its *nonaction*, but by its *positive legislation*, has declared that such commerce shall be free and unrestricted. It is not within the power of any single State to *tax the solicitors or to regulate their number.* If it were, Kansas might authorize the commission men to have three, Missouri ten, Nebraska one, Colorado another number, and in this way interstate commerce in the way of soliciting business in distant States and Territories would be impossible.

That commerce of this nature is restricted and burdened by the by-law in question can admit of no controversy. Each one of the defendants and each person doing a commission business at the Kansas City stock yards has the *constitutional right* to send into distant States and Territories *as many drummers* or solicitors as his business will warrant, and until Congress legislates to the contrary *no power can lawfully limit him in this respect.* The existence of the by-law is indisputable proof that but for it members of the exchange would enjoy their constitutional right of sending their traveling men throughout the country for the purpose of soliciting trade, and so increasing their business, *since if this were not so the by-law would not have been deemed necessary.*

The rules and by-laws of the defendants in this case undertake to limit and restrict the amount of interstate commerce in which its members may be permitted to engage. If they should by a by-law provide that no member should handle cattle having their origin in the State of Montana we apprehend that would be a "restraint of trade or commerce among the States." If the by-laws should provide that no cattle arriving from the State of Colorado should be sold by commission men at the Kansas City market we apprehend the association would be within the condemnation of the statute of July 2, 1890. If the defendants can *limit* they must necessarily have the power to *prohibit* in the matter of solicitors. *Leloup* v. *Port of Mobile*, 127 U. S., 640 (645).

The by-law is clearly an attempt to regulate interstate commerce. If this association can, by its by-laws, limit its number of solicitors, it can also prohibit the sending of solicitors into foreign States and Territories, and so restrict that commerce among the States which Congress has declared shall be free.

The by-law above quoted is *unlawful* and *in restraint of trade*, in that it *deprives* the parties who have consented to it of their *freedom in trade*.

The latest expression of any court upon the subject is *People* v. *Chicago Live-Stock Exchange* (48 N. E. Rep., 1062), where it is held that *a similar by-law in the Chicago Live-Stock Exchange was void, as against public policy*, and a proceeding in *quo warranto* was authorized to be brought against the exchange.

Section 7, involved in that controversy, is as follows:

> There shall be no solicitor employed who is not a member of this exchange. There shall be no solicitor employed except on a stipulated salary, which shall not be contingent on commission earned. Members of the exchange shall file with the secretary thereof, within five days of the time of employment, the name and post-office address of their traveling solicitors. Members shall not employ to exceed three traveling solicitors for each firm in the States of Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, and Minnesota. Members of a commission firm may solicit in the aforesaid States, provided they be counted as the solicitors allowed therein, and provided further, that they comply in all respects with the restrictions governing such solicitors. It shall be a violation of this rule for any solicitor representing, or claiming to represent, a commission firm located in another market to solicit for any Chicago firm in the States before named, and members shall be held responsible for any violation of this section by their partners or employees at other market centers, and shall be held accountable for the acts of any solicitor who, under the guise of soliciting for a branch house, invades the territory above described, and solicits for a Chicago firm. Members may employ an unlimited number of solicitors to solicit outside of the foregoing prescribed territory, provided they comply in all respects with the restrictions governing solicitors. It shall be a violation of this rule for any nonresident member or stockholder of any commission firm to solicit for any commission firm in which he may be interested, unless he be duly registered and employed as a solicitor under the rules and regulations provided. It

> is provided further that members representing commission firms or incorporated companies shall be held responsible for any violation of this rule by the nonresident partners or stockholders of said firms or corporations.

It was alleged on the part of the State that the above rule operated in restraint of trade, and interfered with the just rights of the relator and other members of said corporation in the management and conduct of their business; that for the enforcement thereof said corporation has enacted that "any member of this exchange, or firm in which he may be a partner, violating any of the provisions of this rule shall be fined not less than $250 nor more than $1,000 for the first offense; for a second offense, not less than $500 nor more than $1,000; and if either of such fines is not paid within three days said firm shall be suspended from membership until same is paid. For a third offense they shall be expelled from membership in the exchange."

The answer, as in the case at bar, alleged *that the exchange had no property;* that its rules were adopted to carry out *the objects of its creation;* that its rules were operative upon and applied only *to such persons as had voluntarily sought and obtained membership;* that the powers of the exchange to make rules, and the validity of its rules establishing uniform rates of commission to be charged by its members, and determining that they might deal as live stock commission merchants only with members of the exchange, had already been inquired into in the supreme court of Illinois and sustained, both in proceedings by quo warranto and by injunction, the

judgment in the latter case being affirmed both by the appellate and supreme courts.

The answer further alleges that many such conditions formerly existed which the rule as to solicitors would be calculated to prevent; among others, as tending to *destructive rivalry* in the number of solicitors who are sent out into the country by members to solicit shipments of live stock to their respective employers, amounting to *a war of solicitation* by competing houses, in which those unable to carry it on were *defeated* and *driven out of business*, and business *demoralized* and left in the hands of the victors in the war; that *dishonest* and *irresponsible* and *disreputable* solicitors were employed, who used dishonest, irresponsible, and disreputable methods, and misrepresented the character and credit of rivals; that the business of commission men is confidential, and based on a trust relation, rendering it difficult to ascertain and prove the acts of dishonest solicitors, but that such acts *bring discredit on the entire trade*, and often brought on bitter disputes between members, and led to the *sale of diseased live stock;* that the *rules requiring uniformity in the rates of commission and forbidding rebates of commission* to shippers were frequently violated by commission merchants, who resorted to the device of appointing consignors as *solicitors* of their own shipments, and paying to shippers rebates of commission, under the *guise of compensation* for services as solicitors, and that the appointment and payment of compensation to alleged solicitors was also used as a *collusive device* by money lenders to cover usurious loans to commission merchants, and by

railway employees to cover extortion and unjust discrimination in the use of transportation facilities; that these rules in question would *tend to prevent these evils* and to settle disputes and *promote uniformity and cooperation among the members;* that membership is a *voluntary matter,* and that *any dissatisfied member can withdraw at any time;* that each member, by joining the association, freely and voluntarily surrendered a portion of his natural liberty in the methods of doing this particular business, in order to secure the *greater advantages of cooperation, uniformity, mutual protection, the settlement of disputes, and exclusion of the disreputable methods and diseased products from the business.*

The court said:

> Under this rule of the common law, the right of the *laborer* to dispose of his skill and industry, and contract in reference for the same with whom he pleased and at such contract rates as might be agreed on was recognized and not allowed to be *trammeled with restrictions* which interfered with *individual action and liberty.* Combinations and associations of men have *no right to place restrictions* upon the right of an individual *to contract and engage in business,* employing such means and agencies as are not prohibited by law. *The natural flow of trade and commerce must be unrestricted,* and men engaged therein may *accelerate* its current by all means not unlawful. To this end men engaged in trade and commerce may *advertise, employ men to solicit business, and offer rewards and inducements to secure trade without violating the law of the land,* and in so doing are exercising a right which is in the interest of the public, because *competition* can not be *hostile* to public interest. Efforts to *prevent competition,* to restrict

individual effort and freedom of action in trade and commerce are *restrictions hostile to the public welfare*, not consonant with the spirit of our institutions, and in *violation of law*.

We held in *Frorer* v. *People* (141 Ill., 171): "The privilege of contracting is both a liberty and a property right, and, if A is *denied* the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to employ, it is clear that he is *deprived* of both liberty and property to the extent that he is thus denied the right to contract. Our Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law. And says Cooley: 'The man or the class forbidden the acquisition or enjoyment of property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness.'"

It was also held in *More* v. *Bennett* (140 Ill., 69): "Whatever may be the *professed objects of the association*, it clearly appears, both from its constitution and by-laws, and from the averments of the declaration, that *one of its objects*, if not its *leading* object, is to *control the prices* to be charged by its members for *stenographic work* by restraining all *competition* between them. Power is given to the association to fix a *schedule of prices* which shall be *binding* upon all of its members, and not only do the members, by assenting to the constitution and by-laws, agree to be *bound* by the schedule thus fixed, but their *competition with each other*, either by taking or offering to take a less price, is punishable by the *imposition of fines*, as well as by such other disciplinary measures as associations of this character may adopt for

the enforcement of their rules. The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in *general restraint of trade*, if it is not, indeed, a subordinate application of the same rule. As said by Mr. Tiedeman: 'Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the *freedom of trade* or diminish *competition*, or regulate the price of commodities or services.'"

In other jurisdictions the rule is the same.

In *Rex* v. *Wardens of Coopers Co.* (7 Term R., 543) it was held that a by-law limiting the *number of apprentices* which any member of the company might take was void.

In the case of *Tailors of Ipswich* (11 Coke, 53), a corporation known as the Tailors of Ipswich enacted a by-law to prohibit any tailor from exercising his trade *until he had presented himself before the corporation and proved that he had served seven years as an apprentice*. This by-law was held *void*, as being in restraint of trade. See also *Society* v. *Fell* (Willes, 334). Sustaining the same proposition are *Stanton* v. *Allen*, 5 Denio, 434; *People* v. *Fisher*, 14 Wend., 9; *Norris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St., 173; *People* v. *Medical Soc. of Erie*, 24 Barb., 570.

A case similar to that now under consideration was before the court of appeals of Kentucky. (*Huston* v. *Rentlinger*, 15 S. W., 867.) There the Louisville Board of Underwriters passed a by-law which, among other provisions, prohibited a local company from employing more than *one solicitor*, and regulated the manner in which the salary of such solicitor was to be paid. For a violation of this by-law the offending member of that board forfeited all rights as a member of the association. A local company,

which had employed more than one solicitor, sought to enjoin the enforcement of the forfeiture, on the ground that the association *had no authority to control the members in the employment of solicitors, etc.* A *decree was entered* in accordance with the *prayer of the bill*, which, on appeal, was affirmed, the court saying:

"The majority of the members, *under the guise of producing harmony in this business association*, have taken from their individual members the right to determine how many men they shall employ in their private business, and then only such as the association may think fit for the position. Nor can they employ a solicitor for a less period than six months, or offer a solicitor employment within twelve months after the solicitor has severed his connection with any member; are compelled to discharge those in their employ, if they have more than one; and, if these by-laws are enforced, have *placed their business under the control of the majority vote of the association*—a power the exercise of which was not given by the fundamental law of the order, and doubtless not contemplated when the association was formed. * * * The common-law rule, recognized and adopted when business relations were not so multiplied and extensive as now, and when less necessity existed for enforcing it, *condemned all such restrictions upon trade and business intercourse* with men as is found to exist in this case. The right of one to control his own property as he pleases, and *to employ those necessary to aid him in his business upon such terms as may be agreed upon*, when not in violation of the law of the land, is the rule of the common law; and the right of the laborer to dispose of his skill and industry to whom he pleases, and for the price agreed on, is embraced within the same rule.

> In all classes of business the employer and employee should be allowed *to contract with each other unrestrained by others* who may demand that the one shall give more or the other receive less, and, as a general rule, when restrictions are placed on their right by combinations or associations of men, they will be regarded as *violation of law* and *void*."
>
> The by-law in this case is a *restriction* on *freedom of trade and business*. It *trammels competition*, and prohibits an individual from *contracting* and *engaging in business* and using such agencies and means as he may desire which are not hostile to general law. It is not required for a corporate purpose, nor is it included within the purposes declared in the certificate of incorporation. It was therefore unlawful, as this organization had no right to exercise the power of enacting it under its franchise. *Attempts to place restrictions on trade and commerce and fetter individual liberty of action by preventing competition are hostile to public welfare and affect the interests of the people.* Such an attempt by a corporation is an abuse of its corporate franchise. Public policy requires that corporations, in the exercise of powers, must be confined strictly within their charter limits, and must not be permitted to exercise powers beyond those expressly conferred.

In *Huston* v. *Rentlinger* (Ky.), (15 S. W., 867), speaking of a similar by-law, the court said:

> We do adjudge that the restraint placed upon these appellees by the by-laws of the association as to the *number of solicitors* they may employ and the time of employment, and the compensation to be paid them, and forbidding them to contract with a solicitor, so as to make his pay depend on the number of risks he procures, and forbidding an employment of a solicitor who has severed his connection

with another member, are each and all in violation of law, and the judgment of the chancellor, giving the appellee all the rights pertaining to other members of the association, must be affirmed.

We are quite willing to adopt the definition of "liberty" given by appellants at page 218 of their brief, as follows:

> The liberty mentioned in the Constitution means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all legal ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose *to enter into all contracts* which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned. (*Allgeyer* v. *Louisiana*, 165 U. S., 578, 589.)

The rule in question is illegal and void as in restraint of trade, and is violative of the inalienable right guaranteed by the Constitution to every citizen to contract and to carry on his business as he will, consistent with existing laws. Operating as it does upon commerce among the several States, it is within the terms of the act of July 2, 1890.

III.

THE BY-LAWS OF THE DEFENDANTS DISCRIMINATE AGAINST THE PRODUCTS OF VARIOUS STATES AND TERRITORIES, AND SO ATTEMPT TO REGULATE INTERSTATE COMMERCE.

Section 8 of rule 9 of the rules and by-laws of the Kansas City Live Stock Exchange is as follows:

> SEC. 8. No firm shall handle the business of a nonresident commission house for less than full commissions, except that said consignments be made direct to said nonresident commission house from one of the following-named markets: Chicago, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Omaha, Nebr.; Wichita, Kans.; Denver, Colo.; Pueblo, Colo.; St. Joseph, Mo.; Sioux City, Iowa; Peoria, Ill.; Milwaukee, Wis., and Fort Worth, Tex.

This section is not only an attempt to regulate interstate commerce between the States of Illinois, Missouri, Nebraska, Kansas, Colorado, Iowa, Wisconsin, and Texas, but is a discrimination in favor of consignments coming from the markets above named and a discrimination against other localities. In other words, a consignment of cattle coming from any point in Texas, except Fort Worth, must pay full commissions, and a consignment from that city will be handled for less than full commissions; a consignment coming from Wichita, Kans., will be handled for a less commission than a consignment from some point in New Mexico; a consignment from St. Joseph, Mo., would be handled on a less commission than a consignment from Montana.

It would be beyond the power of the State of Missouri or the State of Kansas to make any regulation of this character, because such a regulation is within the exclusive province of Congress. In questions of interstate commerce, no State or individual or combination of individuals has the right to discriminate against products by reason of their foreign origin.

In *Welston* v. *Missouri* (91 U. S., 275) the statute of the State was as follows:

> Whoever shall deal in the selling of patent or other medicines, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler.

Other sections prohibited a person from dealing as a peddler without a license, and imposed a penalty therefor. This provision of the State statute was held to be void, being in contravention of the Constitution of the United States, which invests Congress with the power to regulate commerce among the States.

The court says (p. 282):

> It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of *discriminating legislation by reason of its foreign character*. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is, therefore, in our judgment, unconstitutional and void.

In *Guy* v. *Baltimore* (100 U. S., 434) an ordinance of the city of Baltimore required that vessels laden with

the products of other States should be required to pay for the use of the public wharves of that city, fees which were not exacted from vessels landing there with products of Maryland. It was held that this ordinance was in conflict with the Constitution of the United States.

The court says (p. 439):

> In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, *impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.*

In *Walling* v. *Michigan* (116 U. S., 446) a State statute imposed a tax upon persons who, not residing or having their principal place of business within the State of Michigan, should engage there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without it, but did not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured within the State. It was held that this act was a regulation in restraint of commerce and repugnant to the Constitution of the United States.

The court says (p. 454):

> The single question now before us for consideration is whether the statute of 1875 is repugnant to the Constitution of the United States. Taken by itself, and without having reference to the act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on

persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not *a discriminating tax* levied against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. * * *

A discriminating tax imposed by a State *operating to the disadvantage of the products of other States* when introduced into the first-mentioned State is, in effect, a regulation in *restraint of commerce among the States*, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

In *Pickard* v. *Pullman Southern Car Company* (117 U. S., 34) it is held that the act of the legislature of Tennessee imposing a privilege tax of $50 per annum on every sleeping car or coach used or run over a railroad in Tennessee and not owned by the railroad on which it is run or used is void so far as it applies to the interstate transportation of passengers carried over railroads in Tennessee, into or out of or across that State, in sleeping cars owned by a corporation of Kentucky and leased by it for transportation purposes to Tennessee railroad corporations, the latter receiving the transit fare and the former the compensation for the sleeping accommodations.

In *In re Schechter* (63 Fed. Rep., 695) the following ruling was made by Sanborn, circuit judge:

A State statute requiring every person selling fruit trees or other nursery stock grown outside the State to file an affidavit with the secretary of state

and a bond of $2,000, and to exhibit to each purchaser a certificate of the secretary that he has complied with these provisions is unconstitutional, as imposing *vexatious and annoying restrictions upon interstate commerce*, and can not be upheld on the ground that it is intended to protect the citizens of the State from the fraudulent representations of such dealers.

In *Aultman, Miller & Co.* v. *Holder* (63 Fed. Rep., 467) there was under consideration the statute of Michigan, which provided that every foreign corporation which shall hereafter be permitted to transact business in this State shall pay to the secretary of state the franchise fee of one-half of 1 mill upon each dollar of the authorized capital stock. The act was held void as a regulation of interstate commerce, although the foreign corporation maintained a warehouse, depot, and repair shop in Michigan.

In *Brimmer* v. *Rebman* (138 U. S., 78) a statute of Virginia, entitled "An act to prevent the selling of unwholesome meat," declared it to be unlawful to offer for sale, within the limits of that State, any beef, veal, or mutton from animals slaughtered 100 miles or more from the place at which it is offered for sale, unless it has been previously inspected and approved by local inspectors appointed under that act. It was provided that the inspector should receive as his compensation 1 cent per pound, to be paid by the owner of the meats. The act did not require the inspection of fresh meats from animals slaughtered within 100 miles from the place in Virginia at which such meats were offered for

sale. It was held that the act was void, as being in restraint of commerce between the States, and as imposing a *discriminating* tax upon the products and industries of some States in favor of the products and industries of Virginia.

It was also held that the owner of meats from animals slaughtered 100 miles or over from Virginia has the right to compete, in the markets of that State, upon *terms of equality with the owner of meats from animals slaughtered in that State or elsewhere* within 100 miles from that place at which they are offered for sale.

The court says (p. 81):

> Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The statute is, in effect, a prohibition upon the sale in Virginia of beef, veal, or mutton, although entirely wholesome, if from animals slaughtered 100 miles or over from the place of sale. We say prohibition, because the owner of such meats can not sell them in Virginia until they are inspected there; and being required to pay the heavy charge of 1 cent per pound to the inspector, as his compensation, he can not compete, upon equal terms, in the markets of that Commonwealth with those in the same business whose meats of like kind, from animals slaughtered within less than 100 miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, *is thus made to depend entirely upon the place where the animals from which the beef, veal, or mutton*

is taken were slaughtered. Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police power, or of exacting inspection laws, *make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.* The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to *compete in the markets* of Virginia upon *terms of equality* with the owners of like meats from animals slaughtered in Virginia or elsewhere within 100 miles from the place of sale. Any *local regulation* which, in terms or by its necessary operation, *denies this equality* in the markets of a State is, when applied to the people and products or industries of *other States*, a direct burden upon commerce among the States, and, therefore, *void.* Citing *Welton* v. *Missouri* (91 U. S., 275, 281); *Railroad Co.* v. *Husen* (95 U. S., 465); *Minnesota* v. *Barber* (136 U. S., 313, 319).

See also *Crutcher* v. *Kentucky* (141 U. S., 47); *Minnesota* v. *Barber* (136 U. S., 313).

If it is beyond the power of any State or municipal corporation to discriminate against the products of any foreign State or locality, how is it possible for a combination of men so to do, in the face of the act of July 2, 1890? Is not this section of the by-laws "a contract or combination in restraint of trade or commerce among the several States?"

The inhabitants of New Mexico or Montana have the right, under the Constitution, to have their cattle placed upon the market in Kansas City without any discrimination against them by reason of their origin.

The section above quoted undertakes to deny the right of all except those in a few favored localities to bring their cattle into the market at Kansas City *without being compelled to pay a greater commission*. The amount of the commission is paid by the owner of the cattle, and the greater the commission the less are the net proceeds of his shipment. The section, therefore, is not only an attempt to regulate commerce among the States, but is an actual discrimination in favor of certain localities in foreign States and against shippers in other localities in foreign States, and, for both reasons, is within the prohibition of the antitrust law.

IV.

THE BY-LAWS OF THE DEFENDANTS PROVIDING FOR MINIMUM COMMISSIONS OPERATE UPON AND TEND TO RESTRAIN INTERSTATE COMMERCE.

Sections 1 to 7 of rule 9 of the rules and by-laws of the Kansas City Live Stock Exchange are as follows:

> SECTION 1. The commissions charged by members of this association for selling live stock *shall not be less* than the following-named rates:
>
> SEC. 2. Six dollars per carload for single-deck carloads of hogs or sheep, and ten dollars per carload for double-deck carloads of same: *Provided*, Members of this exchange may, after charging commissions as above provided, pay a regular sheep

salesman on these yards a sum of money contingent on number of sheep sold; said sheep salesman may be in the employ of other members of the exchange.

SEC. 3. Fifty cents per head for cattle of all ages. In carloads of twenty-four or more, not more than twelve dollars per carload, ten dollars per single-deck carload, and eighteen dollars per double-deck carload of veal calves.

SEC. 4. Fifty cents per head for cattle, and twenty-five cents per head for calves, and ten cents per head for hogs and sheep in mixed carloads, but not to exceed twelve dollars per carload. Fifty cents per head for cattle, and twenty-five cents per head for calves driven into the yards, and ten cents per head for hogs and sheep for sixty head or less; more than that number shall be charged for at carload rates.

SEC. 5. Fifty cents per head for buying cattle for stockers or feeders: *Provided*, Such charges shall not exceed twelve dollars per carload; six dollars per single-deck carload for buying sheep, and ten dollars per double-deck carload. All purchases paid for by a commission house or shipping clearance made by same shall be deemed a purchase, and charged for as above provided.

SEC. 6. Not less than four dollars per single-deck, and five dollars per double-deck carload for buying live hogs, and not less than three cents per head for hogs bought by the head.

SEC. 7. No member or commission firm or corporation represented herein shall do business for a yard trader or speculator on this market for less charges than one-half the regular commission.

SEC. 12. Any member of this exchange, or firm or corporation in which he may be a partner, violating any of the provisions of this rule shall be fined not less than $500 nor more than $1,000 for the first

offense; if said fine be not paid within three days said member or firm may be suspended from membership until same is paid. For a second offense said member or firm may be expelled from membership in the exchange.

A. Whether these rules, fixing the limit of commissions to be charged by the defendants, are in restraint of trade will be considered hereafter under a separate heading. We will first consider whether they operate upon "trade or commerce among the several States."

It must be borne in mind that the defendants perform the duties of commission men in selling cattle which arrive at the Kansas City stock yards from distant States and Territories *for immediate sale and slaughter*, or for immediate shipment to some other market, and also in selling such cattle *for immediate slaughter for foreign markets and for immediate shipment to foreign markets*. In other words, the *owner of cattle* in foreign States sells his property at the Kansas City stock yards through his *agent*, the commission man.

It must also be borne in mind that, under the testimony, the commission men habitually loan money to stock raisers in other States and Territories, on the security of chattel mortgages, with an agreement that the cattle, when ready for market, shall be shipped to and sold by them; and that, in other cases, it is customary for the shipper to secure an advance upon the shipment by drawing a draft upon his commission man, with bill of lading attached, which draft is discounted by the local bank at the place of the shipment and forwarded to the commission man at Kansas City and there paid by

him, by which act the *commission man becomes to all intents and purposes the owner and purchaser of such cattle.* (*Union Stock Yards Bank* v. *Gillespie*, 137 U. S., 415.)

It must also be remembered that the commission men are actively engaged in *soliciting shipments* from various parts of the United States, *contracting for the making of such shipments*, the making of *loans*, the making of *advancements* on such shipments, etc.

The rules of the Live Stock Exchange operate upon and directly affect this class of business, and the question as to whether it is interstate commerce will now be considered.

In the first place, what is trade or commerce?

It is said in *The Daniel Ball* (10 Wall., 557):

> Whenever a *commodity has begun to move, as an article of commerce, from one State to another*, commerce in that commodity between the States has commenced.

It is thus defined in *Welton* v. *Missouri* (91 U. S., 275):

> Commerce is a term of largest import. It comprehends *intercourse for the purposes of trade in any and all its forms*, including the *transportation, purchase, sale, and exchange of commodities* between the citizens of our country and the citizens or subjects of other countries and between the citizens of different States. The power to regulate it embraces all the *instruments by which such commerce may be conducted.*

Commerce is thus defined in *Gloucester Ferry Co.* v. *Pennsylvania* (114 U. S., 196):

> Commerce among the States consists of *intercourse and traffic between their citizens*, and includes the

> transportation of persons and property, and the navigation of public waters for that purpose, as well as the *purchase, sale, and exchange of commodities.* The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to *prescribe the rules by which it shall be governed*, that is, the *conditions upon which it shall be conducted;* to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the *instrumentalities by which that commerce may be carried on*, and *the means by which it may be aided and encouraged.* The subjects, therefore, upon which the power may be exerted are of infinite variety.

In the very recent case of *United States* v. *E. C. Knight Company* (156 U. S., 13), the court says:

> The regulation of commerce applies to the subjects of commerce and not to matters of internal police. *Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit*, may be regulated, but this is because they form part of *interstate trade or commerce.*

In *County of Mobile* v. *Kimball* (102 U. S., 691, 702), it is said that—

> Commerce with foreign countries and among the States, strictly considered, consists in *intercourse and traffic*, including in these terms navigation and the *transportation and transit of persons and property*, as well as the *purchase, sale, and exchange of commodities.*

The power to regulate commerce among the several States has been applied in many cases and to many varying

and different groups of facts. When an article once *starts to move*, as a subject of interstate commerce, it is within the *protection of Federal control;* and this control *does not cease* when the article reaches the boundary line of a State, but *continues* and *protects the article* from State burdens and restrictions until it has been sold and, *by that act, has become mingled with the mass of property in the State.* The action of any power, whether State or municipal, or a combination of individuals, which undertakes to *intercept* the article of commerce and impose a *burden* or *restriction* upon it between the time of its arrival in the State and its being sold, and so becoming mingled with the mass of property within the State, is repugnant to the Federal Constitution.

In the present instance, great numbers of cattle and other live stock are shipped from Western States and Territories to the Kansas City market *for immediate sale and slaughter.* The defendant commission men are *engaged in promoting this trade.*

In the language of the lower court:

> *They reach out over many States and Territories, by their solicitors and advertisements, and gather in for sale and slaughter millions of cattle, sheep, and hogs; and their rules and regulations cover the entire business and extend over the whole field of operation.*

The great packing houses at Kansas City are the purchasers from the commission men, and their purchases are made for the purpose of shipping the dressed product either to foreign countries or to sister States. Great numbers of cattle coming from distant States are started on their interstate journey for Chicago with the privilege

of stopping at Kansas City, to be sold there if the market is favorable, and if not, to continue their journey to Chicago.

The questions to be considered now are, (1) are the cattle, shipped from a foreign State and arriving at the stock yards for immediate sale, or shipment to another market, subjects of interstate commerce while in the stock yards, before they are sold? *In other words, may the owner of cattle, residing in a distant State or Territory, bring them to the Kansas City market and there sell them, through his agent, without being subject to any restriction or limitation, except such as may emanate from the General Government?* (2) Are the *traffic and intercourse* between the commission men at the stock yards and the owners of the cattle in distant States and Territories *commerce among the several States?* (3) Is the business of the defendant commission men to be regarded as interstate commerce by reason of the location of the stock yards upon the State line and the manner in which their business is done resulting therefrom?

Taking up the first question, we say it must be conceded that the *right to import* from a sister State, implies the *right of the importer to sell, free from burden or restriction.* The laws of the United States *guarantee* to the owner of cattle in the State of Texas the right to introduce them into the State of Missouri or the State of Kansas; but such right would be of *no avail* unless the owner be permitted, as an incident to such right, *to sell them.* The States of Missouri or Kansas can not prevent the importation of such cattle, *and neither can they pre-*

vent the sale thereof by the importer, as an incident to such right. Nor can a combination of persons exercise a power which is denied to sovereign States.

That the right to import includes, *by necessary implication,* the right *to sell in the original package* is apparent from a glance at the authorities.

In *Bowman* v. *Railway Company* (125 U. S., 465) the court, after holding a State statute forbidding importation of liquors to be void, says, on page 499:

> It is easier to think that the right of importation from abroad, and of transportation from one State to another, *includes*, by necessary implication, *the right of the importer to sell in unbroken packages at the place where the transit terminates*, for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce *which consists in the sale and exchange of the commodities transported.* Such, indeed, was the point decided in the case of *Brown* v. *Maryland* (12 Wheat., 419) as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States.

Field, J., in his concurring opinion, says, on pages 504, 505:

> That the *right of importation* carries with it *the right to sell the article imported does not appear to me doubtful.* Of course I am speaking of an article that is in a healthy condition, for when it has become putrescent or diseased, it has ceased to be an article of commerce, and it may be destroyed or its use prohibited. To assert that, under the Constitution of the United States, the importation of an article of

commerce can not be prohibited by the States, and yet to hold that *when imported its use and sale can be prohibited*, is to declare that the right which the Constitution gives is a *barren one*, to be used only so far as the burden of transportation is concerned, and to be *denied so far as any benefits from such transportation are sought*. The framers of the Constitution never intended that *a right given* should not be *fully enjoyed*. In *Brown* v. *Maryland* (12 Wheat., 419, 446) Chief Justice Marshall, in delivering the opinion of the court, speaking of the commercial power of Congress, and after observing that it is coextensive with the subject on which it acts, and can not be stopped at the exterior boundary of a State, but must enter its interior, said: "If this power reaches the interior of a State, and may be there exercised, it must be capable of *authorizing the sale of those articles which it introduces*. Commerce is *intercourse;* one of its most ordinary ingredients is *traffic*. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficiency should be complete, *should cease at the point when its continuance is indispensable to its value*. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a *sale* of the thing imported? *Sale is the object of importation, and it is an essential ingredient of that intercourse of which importation constitutes a part*. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to *authorize the importer to sell*. The power claimed by the State is, in its nature, in conflict with that given to Congress, and the greater

> or less extent in which it may be exercised does not enter into the inquiry concerning its existence. We think, then, that if the power to authorize a sale exists in Congress, the conclusion that *the right to sell is connected with the law permitting importation*, as an inseparable incident is inevitable." And the Chief Justice added: "We suppose the principles laid down in this case to apply equally to importations from a sister State" (p. 449).

Again, Field, J., says on pages 506, 507:

> So in the present case it is perhaps impossible to state any rule which would determine in all cases where the right to sell an imported article under the commercial power of the Federal Government ends and the power of the State to restrict further sales has commenced. Perhaps no safer rule can be adopted than the one laid down in *Brown* v. *Maryland, that the commercial power continues until the articles imported have become mingled with and incorporated into the general property of the State and not afterwards.*

In *Leisy* v. *Hardin* (135 U. S., 100), where a statute of Iowa prohibiting the sale of liquors was held void as to an importer on account of its interference with interstate commerce, the court says, on page 119:

> The doctrine now firmly established is, as stated by Mr. Justice Field, in *Bowman* v. *Chicago, etc., Railway Co.* (125 U. S., 507), that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers,

and docks, and the like, which can be properly regulated only by *special provisions* adapted to their localities, the State can act *until Congress interferes and supersedes its authority;* but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all of the States, such as *transportation between the States, including the importation of goods from one State into another*, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the *disposition* of the import until thus mingled.

Again, after citing sundry decisions, the court says, on pages 122, 123:

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the National Government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, *the receipt of an imported commodity or its disposition* before it has ceased to become an article of trade between one State and another or another country, and this it comes in conflict with

a power which, in this particular, has been exclusively vested in the General Government, and is therefore void.

Again the court says on page 124:

> The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago, etc., Railway Co., supra*, they had the right to import this beer into that State, and in the view which we have expressed, *they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State*. Up to that point of time we hold that, in the absence of Congressional permission to do so, *the State had not power to interfere*, by seizure or any other action, in prohibition of *importation and sale* by the foreign or nonresident importer.

See also the recent case *In re Lebolt*, (77 Fed. Rep., 587), which follows *Leisey* v. *Hardin*.

In *In re Rahrer* (140 U. S., 545), in sustaining the validity of an act of Congress making liquors subject to State law upon arrival within the State, the Supreme Court says, on pages 55–60:

> The laws of Iowa under consideration in *Bowman* v. *Railway Company* (125 U. S., 465), and *Leisey* v. *Hardin* (135 U. S., 100), were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States; but as they inhibit the receipt of an imported commodity, or *its disposition before it had ceased to become an article of trade between one State and another* or another country and this, they amounted in effect to a regulation of such commerce.

Hence it was held that inasmuch as interstate commerce, consisting in the *transportation, purchase, sale, and exchange of commodities*, is national in its character and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled, and therefore that the laws of Iowa referred to were inoperative in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, *or their sale upon arrival in the form in which they were imported there from a foreign country or another State*.

Again the court says, on pages 562, 563:

We inquire, then, whether fermented, distilled, or other intoxicating liquors or liquids transported into the State of Kansas and there offered for sale and sold, after the passage of the act, became subject to the operation and effect of the existing laws of that State in reference to such articles. It is said that this can not be so, because, by the decision in *Leisey* v. *Hardin*, similar State laws were held unconstitutional, in so far as they prohibited the sale of liquors by the importer in the condition in which they had been imported. In that case, certain beer imported into Iowa had been seized in the original packages or kegs, unbroken and unopened, in the hands of the importer, and the supreme court of Iowa held this seizure to have been lawful under the statutes of the States. We reversed the judgment, upon the ground that the legislation to the extent indicated, that is to say, as construed to apply to importations into the State from without and to permit the seizure of the

> articles before they had, *by sale or other transmutation, become a part of the common mass of property of the State*, was repugnant to the third clause of section 8 of article 1 of the Constitution of the United States, in that it could not be given that operation without bringing it into collision with the implied exercise of a power exclusively confided to the General Government.

In *In re Sanders* (52 Fed. Rep., 802), Goff, circuit judge, held void an act prohibiting sale of seed packages unmarked by the date when such seed were grown with respect to the selling of seed in the original packages imported from another State.

In *In re Minor* (69 Fed. Rep., 333), where an act of West Virginia, exacting the payment of a license fee for the sale of cigarettes imported from another State and sold in the original packages, either by the importer or by an agent, was under consideration, the court says:

> The right to purchase in one State carries with it the *right to sell the article so purchased in another State regardless of State laws*, and independent of local interests and jealousies. Were this not so, the commerce between the States could be and in many instances would be entirely destroyed. *It is only by the sale of the imported articles that it becomes mingled with the other property in the State.*

The leading case of *Leisy* v. *Hardin*, which upholds the right of importation and sale free from regulations that may be imposed by any except the Federal power, is reaffirmed in the latest case upon the subject, *Scott* v. *Donald* (165 U. S., 58, 95), in the following language:

> In *Leisy* v. *Hardin* (135 U. S., 100) it was recognized that ardent spirits, distilled liquors, ale, and

beer are subjects of exchange, barter, and traffic like any other commodity in which a right of traffic exists, and that being thus articles of commerce, a State can not, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State, *nor when imported prohibit their sale by the importer;* and, accordingly, it was held that a statute of the State of Iowa prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under a license from a county court of the State, was, *as applied to a sale by the importer,* and in the original packages or kegs, unbroken and unopened, of such liquors manufactured and brought from another State, *unconstitutional and void,* as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.

In *In re May* (82 Fed. Rep., 422) it is said:

> It is claimed that the right to ship cigarettes from the State of New York to that of Montana carries with it the right to sell the same in Montana in the original packages. There is no doubt but that this is the established doctrine of the Federal courts.
>
> *Guckenheimer* v. *Sellers*, 81 Fed. Rep., 997.
>
> *Donald* v. *Scott*, 76 Fed. Rep., 559.
>
> *State of Iowa* v. *MacGregor*, 76 Fed. Rep., 956.
>
> *State* v. *Lagarde*, 60 Fed. Rep., 186.

As said by the lower court in this case (82 Fed. Rep., 541):

> This live stock is shipped from different States *for immediate sale*, and if the market at Kansas City is not satisfactory, it is to be shipped to another market. *I can not believe it ceases to be the subject of interstate commerce when unloaded into the stock yards.*

In *Cotting* v. *Kansas City Stock Yards Co.* (82 Fed. Rep., 842), in speaking of these very Kansas City stock yards, the court said:

> There can be no doubt that *all live stock shipped from other States than Kansas and Missouri to these yards is the subject of interstate commerce*, nor can there be any doubt that shipments of stock originating in Kansas and Missouri and consigned to other States come under the same designation.

In the same case (82 Fed. Rep., 850 (852)), Judge Thayer said:

> *Much business is transacted at the Kansas City stock yards consisting in the purchase and sale of live stock shipped to that market from other States than Kansas, which is interstate commerce.*

Speaking of the right of the State of Kansas to limit the charges to be made by the stock yards, Judge Thayer continues:

> The court is of the opinion that this power to fix a limit to such charges is not of such an exclusive character as to prevent the State of Kansas from exercising a similar power, *in the absence of any legislation on the subject by Congress.*

Bearing in mind that the commission man is the agent of the importer, and that the cattle when sold by the commission man are in process of being *sold* by the *importer*, it is, we submit, clear that when the sale is made the cattle, coming from distant States, are then subjects of interstate commerce. In other words, the rules and by-laws of the defendants *operate upon and affect commerce between the several States.*

It must also be remembered that the contract between the defendants, including the rules fixing minimum charges, is *prospective in its operation.* It is designed to affect the sale of cattle and other live stock which may *thereafter* be shipped into the State. It is an *agreement* among the defendants that cattle located in the sister States tributary to the Kansas City market *shall be subject to a charge or burden of 50 cents per head when they shall, in the course of time, be shipped to the Kansas City market.*

It is impliedly conceded by the defendants' answer, and is amply established by the affidavits, that the defendant commission men sell all of the stock that is sold on commission at the Kansas City stock yards, and that it is their purpose and the effect of their organization to *prevent any other person from selling stock on commission at those yards.* It is true that in one sense the owner of the stock may accompany it and sell it himself, but this is true only in *theory*—in the same way that any man, theoretically, may prosecute or defend his own case in the courts without the aid of an attorney. In *actual practice* and *in fact* no one can sell stock on commission at the Kansas City stock yards except the defendants, and this is amply borne out by the affidavits.

If these defendants, composing the Kansas City Live Stock Exchange, can arbitrarily fix a commission to be paid for the services to be performed by them in selling live stock, *what is to prevent their fixing the charge at $5 per head instead of 50 cents per head?* What is to prevent their passing a resolution fixing a charge of $5 per

head on cattle coming from Texas, $6 per head on cattle coming from Colorado, and 50 cents per head on cattle coming from Kansas or Missouri? What is to prevent their excluding Montana cattle entirely from the Kansas City market? Would any one hesitate to say that such acts would be a contract, combination, or conspiracy in restraint of trade or commerce among the several States? *The principle is the same whether the charge is fixed at 50 cents or $5.* It is, after all, a question of *power*.

B. The relation of the commission men to their customers and patrons in other States and Territories must also be considered.

The commission men not only buy and sell cattle originating in distant States and Territories for shipment to points beyond the States of Kansas and Missouri, but, according to the uncontradicted evidence, they are also engaged *in making loans* to the cattle raisers, the loans being secured upon the cattle purchased with the proceeds of the loan and by agreement that the cattle, when ready for market, shall be shipped to the Kansas City yards and sold by the commission men making the loan. The commission men also, as shown by the uncontradicted evidence, are accustomed to making advancements upon the consignments of stock to them, by means of the payment of a draft drawn by the shipper at the time of the shipment.

It is submitted that this business constitutes *intercourse and traffic between the citizens of different States.* The Federal regulation of commerce applies (*United States* v. *E. C. Knight Co.*, 156 U. S., 13) to (1) contracts to buy, sell or exchange goods to be transported among the several

States; (2) the transportation and its instrumentalities, and (3) the articles bought, sold, or exchanged for the purpose of such transit among the States or put in the way of transit.

If the commission man purchases cattle located in Montana, to be transported thence to Kansas City, the making of the contract of sale is interstate commerce, as well as the transportation of cattle and instrumentalities used in such transportation; and so are the cattle bought for such interstate transit. The practice of the commission men in making loans, advancing money, taking mortgages, having the cattle shipped to them in their own names *is in law a purchase of the cattle*. Thus, in *Union Stock Yards Bank* v. *Gillespie* (137 U. S., 415), one Gillespie advanced money for the purchase of cattle, and was held to be the owner thereof so far as necessary to protect his rights.

Mr. Justice Brewer said:

> In equity the Gillespies may properly be considered the *owners*. They paid for the cattle; the orders for possession, equivalent to bills of sale, were in their name; they controlled the shipments, and until their money advanced and stipulated profits were received *they were equitably the owners and in control*.

If the defendant commission men were engaged in soliciting shipments of cattle from Europe, for example, and were engaged in making advances upon such shipments, and paying drafts drawn in the foreign country against the shipments, would any one say they were engaged in domestic commerce? and yet, if their business

extends beyond the State line they "may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool." (*Covington Bridge Co.* v. *Kentucky*, 154 U. S., 204.) Such business, we submit, can be regulated alone by Congress, acting under the power of the Constitution. No State or combination of individuals can regulate such intercourse and such traffic.

Many cases have arisen and have become the subject of adjudication in which the facts are somewhat similar to those in the case at bar, and a consideration of those cases may serve to throw light upon the present controversy.

In *Gloucester Ferry Company* v. *Pennsylvania* (114 U. S., 196), the ferry company was incorporated under the laws of New Jersey, and had established a steam ferry from the town of Gloucester, in that State, to Philadelphia, across the Delaware River. At each place it had a dock or slip, on which freight and passengers were received; the one at Gloucester is owned, the one at Philadelphia is leased. The State of Pennsylvania imposed a tax upon the ferry company, the amount being a certain percentage of the dividends earned. This tax was held to be void, as the business was interstate commerce, subject to the regulation of Congress alone.

In *Philadelphia and Southern Steamship Co.* v. *Pennsylvania* (122 U. S., 326), the legislature of Pennsylvania passed an act requiring every railroad company to pay to the State treasurer, for the use of the Commonwealth, a tax of eight-tenths of 1 per cent upon the gross receipts of said company for tolls and transportation. It

appeared from the evidence that the steamship company was engaged in operating seagoing steamships, engaged in the business of ocean transportation between different States of the United States and between the United States and foreign countries, and that the gross receipts sought to be taxed were received for freight and passengers carried in said steamships on the ocean and on the navigable waters of the United States, between the State of Pennsylvania and other States of the United States. It was held by the court that the act of the legislature of Pennsylvania was void, as an attempted regulation of interstate commerce, and the case of *State Tax on Railway Gross Receipts* (15 Wall., 284) was practically overruled.

In *Hall* v. *De Cuir* (95 U. S., 485), an act of the legislature of Louisiana provided that all common carriers of passengers were forbidden to refuse admission to their conveyances or to expel therefrom any persons whomsoever, except those who refused to pay fare, etc. The plaintiff, a person of color, took passage upon the boat on her trip up the river from New Orleans, for Hermitage, a landing place within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought an action for damages. The defense was that the statute was inoperative and void, because it was an attempt to regulate commerce among the States. The court sustained the defense, and held the regulation to be unconstitutional and void.

The same principle is sustained in *Robbins* v. *Shelby County Taxing District* (120 U. S., 489).

The case of *Asher* v. *Texas* (128 U. S., 129) is similar to the one last cited. The statute of Texas provided for the levying of a tax upon every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise. Asher, the plaintiff, was a citizen and resident of the city of New Orleans, in Louisiana, and was engaged in Texas in the business of soliciting trade, by the use of samples, for the house for which he worked as drummer, which was located at New Orleans. It was held that the statute was repugnant to the Constitution of the United States as an attempted regulation of interstate commerce.

In *Almy* v. *California* (24 How., 169), the State of California, by its legislature, imposed a stamp tax upon bills of lading. It was held that the act was void, in so far as it affected bills of lading for the transportation of merchandise outside of the State of California.

In *Brown* v. *Maryland* (12 Wheat., 436), the State legislature, by an act, required all importers of foreign goods, by the bale or package, and other persons selling the same, by wholesale, bale or package, etc., to take out a license, for which they should pay $50, and in case of neglect or refusal to take out such license subjecting them to certain forfeitures and penalties. It was held that this act was repugnant to the Constitution of the United States, which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In *Guy* v. *Baltimore* (100 U. S., 434), an ordinance of the city of Baltimore undertook to exact a license for

the use of public wharves of the city by vessels laden with products of other States, no fees being exacted from vessels landing thereat with the products of Maryland. It was held that the ordinance was void, as an attempted regulation of interstate commerce; that the protection of the Federal Constitution followed the products of foreign States into the State of Maryland, and protected them from hostile legislation.

In *Railroad Company* v. *Husen* (95 U. S., 465), the statutes of Missouri prohibited driving or conveying any Texas, Mexican, or Indian cattle into the State between the 1st day of March and the 1st day of November in each year. The statute was declared void and in conflict with the Constitution, which ordains that Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In *Walling* v. *Michigan* (116 U. S., 446), the legislature of Michigan undertook to impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. This act was held to be void, as an attempted regulation of commerce.

In *Pickard* v. *Pullman Southern Car Company* (117 U. S., 34) the legislature of Tennessee imposed a privilege tax of $50 per annum on every sleeping car or coach used or run over a railroad in Tennessee and not owned by the railroad on which it was run or used. The court held the act void, so far as it applied to the

interstate transportation of passengers carried over railroads in Tennessee, into or out of or across that State, in sleeping cars owned by a corporation of Kentucky.

In *Wabash, St. Louis and Pacific Railway Company* v. *Illinois* (118 U. S., 557) the legislature of Illinois enacted that, if any railroad company should, within that State, charge or receive for transporting passengers or freight of the same class, the same or a greater sum for any distance than it did for a longer distance, it should be liable to a penalty for unjust discrimination. The defendant in this case made such discrimination in regard to goods transported over the same road or roads, from Peoria, in Illinois, and from Gilman, in Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former being 86 miles nearer to New York than the latter, this difference being in the length of the line in the State of Illinois. It was held that the act of the legislature of Illinois was an attempt to regulate interstate commerce, and was void.

In *Ex parte Loeb* (72 Fed. Rep., 657) the statute of South Carolina provided that it should be "unlawful for any person to take or solicit orders, or to receive money from other persons, for the purchase or shipment of any alcoholic beverages for or to such other persons in this State, and, upon conviction, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment for a term," etc. This act was held to be void, as an attempted regulation of interstate commerce.

In *Donald* v. *Scott* (74 Fed. Rep., 859) a South Carolina statute declared that all intoxicating liquors which

were not purchased of a State officer authorized to sell the same, and which had not been tested by the chemist of the South Carolina College and found to be chemically pure, were of a poisonous and detrimental character, and that their use as a beverage was against the morals, good health, and safety of the State. It forbade the accepting, storing, and keeping possession thereof, and made it unlawful for any consignee or other person to take from any depot or place, or to pay freight, express, or other charges thereon, and authorized their seizure by State officers wherever found. It was held that, in so far as this act applied to liquors sent into the State from other States, it was void, as an interference with interstate commerce.

This ruling is affirmed in the recent case of *Donald* v. *Scott* (165 U. S., 58).

In *In re Minor* (69 Fed. Rep., 233) the act of West Virginia provided that a certain license fee should be paid for selling cigarettes at retail. It was held that, so far as the act applied to cigarettes imported from another State and sold by the manufacturer in West Virginia in the original package, and to cigarettes manufactured in another State and by the manufacturer sent into West Virginia in the original package, for sale by the agent of the manufacturer, it was not an exercise of the police power of the State, but a regulation of interstate commerce, and therefore void.

In *Ex parte Hough* (69 Fed. Rep., 330) the act of North Carolina requiring every one, before engaging in selling pianos or organs by sample, list, or otherwise, in that State, to pay $250 for a license is, in the case of one selling by sample and list as agent for a manufacturer and

dealer located in another State, void, as a regulation of interstate commerce.

In *Southern Railway Company* v. *City of Asheville* (69 Fed. Rep., 359) it is held that the act of North Carolina authorizing a city to levy on every railroad company doing business or having an office in the city a license tax not to exceed 1 per cent of the gross receipts of its business is invalid in the case of a railroad whose business extends to points out of the State as a regulation of interstate commerce, and therefore a tax levied under it is invalid, even though it is limited to the business of the railroad company done within the State.

In *Webster* v. *Bell* (68 Fed. Rep., 183) it was held that an ordinance imposing a license tax upon "every express company having an office in the city of A., Va., and receiving goods and forwarding them to points within the State of Virginia, or receiving goods within the State of Virginia and delivering them in the city of A.," is repugnant to the interstate commerce law, and is void.

This identical question has been recently passed upon by the Kansas court of appeals (48 Pac., 924).

In *Gulf, Colorado and Santa Fe Railway Co.* v. *Hefley* (158 U. S., 98) the statute of Texas, making it unlawful for a railroad company in that State to charge and collect a greater sum for transporting freight than is specified in the bill of lading is, when applied to freight transported into the State from a place without it, in conflict with the interstate commerce act, and void as to interstate shipments.

In *Brennan* v. *Titusville* (153 U. S., 289), the city of Titusville, in the State of Pennsylvania, had passed an

ordnance providing "that all persons canvassing or soliciting within said city orders for goods, books, painting, wares, etc., shall be required to procure from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following sums," etc. The defendant at the time of his arrest under said ordinance was an agent of one Shephard, residing in Chicago, and was engaged in soliciting orders for pictures and picture frames in the city of Titusville by going from house to house. The ordinance was held to be void as a regulation of interstate commerce.

In *Minnesota* v. *Barber* (136 U. S., 313), the statute of Minnesota entitled "An act for the protection of the public health by providing for inspection, before slaughtering, of cattle, sheep, and swine designed for slaughter for human food," is unconstitutional and void, so far as it requires, as a condition of sales in Minnesota of fresh beef, veal, mutton, lamb, or pork for human food, that the animals from which said meats are taken shall have been inspected in that State before being slaughtered.

In *In re Rozelle* (57 Fed. Rep., 155)—opinion by Judge Williams—it is held that a municipal ordinance which imposes a license tax on every merchandise broker who maintains a warehouse or office within the city limits is void as to a broker whose sole business is making contract by sample for the sale and delivery to citizens of the State of merchandise which, at the time of making the contract, is the property of citizens of other States, and is situated therein; for as to him it is a regulation of interstate commerce, and contravenes the provision of

the Federal Constitution vesting power to regulate such commerce exclusively in Congress.

One of the most recent and instructive cases upon the subject is found in *Covington Bridge Co.* v. *Kentucky* (154 U. S., 204). There a bridge company was incorporated under an act of the legislature of Kentucky in 1846, with authority to construct a bridge across the Ohio River at Cincinnati. The State of Ohio incorporated the same company, and the bridge was thereupon constructed, connecting the two States. An act of the legislature of the State of Kentucky in 1890 undertook to prescribe the rates of toll which should be charged for crossing the bridge. In a criminal prosecution arising from a violation of this act, the question whether the tolls were properly regulated by the State of Kentucky or whether it was a matter of Federal regulation was before the Supreme Court, and it was held that traffic across the river was interstate commerce, that the bridge was an instrument of such commerce, and that the Kentucky statute was an attempted regulation of such commerce, which the State had no constitutional power to make, and that Congress alone possessed the requisite power to enact a uniform scale of charges in such a case, the authority of the State being limited to fixing tolls on such channels of commerce as are exclusively within its territory.

C. In the light of the foregoing authorities can it be said that the traffic of the commission men at the Kansas City stock yards, composed as it is, to a large extent, of intercourse between themselves and citizens of foreign States and Territories, is not interstate commerce? Are

not the laws of any one State inadequate and inappropriate to control such traffic and intercourse?

The stock pens, loading and unloading chutes, weighing appliances, and other appliances detailed in evidence, together with the offices of the commission men, are located partly on one side of the State line and partly on the other. The evidence discloses that, in the ordinary course of business, commission men on the Missouri side make sales to commission men on the Kansas side, and *vice versa;* that cattle on the Kansas side are sold for delivery on the Missouri side, and *vice versa;* that cattle arriving on one side of the line are unloaded there and penned on the other side; that in the course of making a sale the commission man performs his services partially on one side and partially on the other; that the cattle, in the course of being received, sold, and reshipped, are partially in Kansas and partially in Missouri.

Without going into the minute details of the manner of transacting business at the stock yards, it is apparent that it is impossible to say, in a great majority of cases, what part of the commission man's duty is performed in one State and what part in the other. In the course of making the sale and in the course of weighing the cattle they are sometimes in Kansas and sometimes in Missouri, and it can not be told, without a survey of the hoof prints of each animal, whether it was in Kansas or Missouri, or both, at the time of the completion of its sale.

The very purpose of investing the National Government with authority to control interstate commerce was to prevent conflicting and confusing, as well as hostile,

legislation by the States on the particular subject. It is submitted that where a business transaction so involves two different States that it may not be properly regulated by either one of them, it is then such a subject of interstate commerce as requires uniform national legislation. If the legislature of Kansas undertakes to regulate the business of commission men by prescribing their duties, or regulating or limiting their charges, it is apparent that such legislation is inadequate and inappropriate, because no human being can tell to what transaction it would apply, since it can not be told whether a given transaction occurred and was consummated in the State of Missouri or Kansas. If the States of Kansas and Missouri are free to legislate upon such a subject, then we may have a set of regulations made by the State of Missouri and an entirely different set made by the State of Kansas, conflicting in their nature, which would prove an embarrassment and a hindrance to the conduct of the business. It was to obviate just such embarrassments and restraints upon interstate traffic that the subject was left to the uniform regulation of the Federal Government.

In the case of *Covington Bridge Company* v. *Kentucky* (154 U. S., 204), a bridge across a navigable stream separating two States was held to be an instrument of commerce, and that tolls or charges for using such bridge could not be regulated by any single State, but were subject to regulation by Congress alone. The reason upon which this decision is based is that the traffic concerns two different States, and if each one has the power to or

undertakes to regulate that traffic, an intolerable confusion will result. This is expressed by the court in the following language:

> It is clear that the State of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own State. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil, and without authority from that State to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the State of Kentucky had the right to regulate the travel upon such bridge and fix the tolls, the State of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the States; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each State (if the subject be one for State regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each State may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint, or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally

for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own State; and as persons living in one State and doing business in another would necessarily have to cross the bridge at least twice a day, the rate of toll might become a serious question to them. Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the State, so frequently recognized by this court, to fix tolls for the use of wharves, piers, elevators, and improved channels of navigation has always been limited to such as were exclusively within the territory of a single State, thus affecting interstate commerce but incidentally, and can not be extended to structures connecting two States without involving a liability of controversies of a serious nature. For instance, suppose the agent of the bridge company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling the person holding the ticket to pass from Ohio to Kentucky, it would be mere *brutum fulmen* to attempt to punish such agent under the laws of Kentucky; or, suppose the State of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky who had not paid the toll required by the Ohio statute or, that Kentucky should enact that all persons crossing from Kentucky to Ohio should be entitled to a free passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction, it might be an advantage to one State to make the charge for foot passengers very low and the charge for merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky, in this instance, where the larger city is upon

> the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

The same principle controlled the case of *Hall* v. *De Cuir* (95 U. S., 487). There the State of Louisiana passed a law for the regulation of the business of carriers of passengers within the State. The law had been disregarded by the defendant in the action, who was running a steamboat from New Orleans, La., to Vicksburg, Miss. The plaintiff had taken passage upon the boat in New Orleans to be carried to a landing on the Mississippi River called Hermitage, in Louisiana. The points of embarkation and destination, as well as the river between them, were in Louisiana.

The court said:

> The river Mississippi passes through or along the border of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State would provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others. Nay, more, it would prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other side another. Commerce can not flourish in the midst of such embarrassments. *No*

> *carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him if on one side of the State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other side be kept separate.* Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by State lines, has been vested with the exclusive legislative power of determining what such regulation shall be.

The same considerations controlled the court in deciding *Gloucester Ferry Co.* v. *Pennsylvania* (114 U. S., 196). The ferry company was incorporated under the laws of New Jersey, and established a steam ferry from the town of Gloucester, in that State, to Philadelphia, across the Delaware River. At each place it had a dock or slip on which freight and passengers were received; the one at Gloucester it owned, the one at Philadelphia it leased. The State of Pennsylvania imposed a tax upon the ferry company, the amount being a certain percentage of the dividends declared. The tax was held to be void, for the reason that the business was interstate commerce.

In passing upon the case, the court says:

> And it needs no argument to show that the commerce with foreign nations and between the States, which consists of the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise there could be no protection against

> conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress.

Is there any distinction in principle between a bridge over a navigable stream, connecting two States, and the business of these defendant commission merchants, whose daily transactions contemplate services performed in different States and performed upon subjects of commerce which move from one State to the other in the course of the transaction? If the commission man's employment contemplated that in making a sale of cattle from Montana, for example, he should make a trip to Chicago and Omaha, and that the cattle in the course of the transaction should be moved from Kansas to Nebraska and Illinois, is there any question that the transaction would be one involving interstate commerce?

It makes no difference in principle that the Kansas part of the stock yards and the Missouri part of the stock yards are separated merely by the State line. Distance is immaterial.

As the court says in the *Covington Bridge Company Case, supra:*

> If * * * interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the State line, regardless of the distance from which it comes or to which it is bound, before or after crossing such State line. * * *

> Commerce was defined in *Gibbons* v. *Ogden* (9 Wheat. 1, 189) to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool.

May it not be equally well said that the commission men, who, in the course of their usual and customary occupations, pass and repass from the Missouri part of the stock yards to the Kansas side, and *vice versa*, are "as truly engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool?"

It is not believed that any set of regulations devised by either Missouri or Kansas alone would be adequate or appropriate for the regulation of such business, and it therefore belongs to the domain of interstate commerce.

The interstate character of the business transacted by the defendant commission men at the Kansas City stock yards is further emphasized by the Federal legislation upon the subject.

Sections 4386, 4390 of the Revised Statutes of the United States provide that any railroad company whose road forms any part of a line of road over which animals are conveyed from one State to another is prohibited from confining the same in cars over twenty-eight consecutive hours without unloading them for rest, water, and food, for at least five consecutive hours.

By the act of May 29, 1884, a Bureau of Animal Industry was established, "to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals."

Section 6 of said act is as follows:

SEC. 6. That no railroad company within the United States, or the owners or masters of any steam or sailing vessel or other vessel or boat, shall receive for transportation or transport from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia.

Nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia.

Provided, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six, and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

Then follows the act of March 3, 1891, entitled "An act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, and for other purposes."

Section 2 of said act is as follows:

SEC. 2. That the Secretary of Agriculture shall also cause to be made a careful inspection of *all live cattle the meat of which is intended for exportation to any foreign country*, at such times and places, and in

such manner, as he may think proper, with a view to ascertain whether said cattle are free from disease and their meat sound and wholesome.

And may appoint inspectors, who shall be authorized to give an official certificate clearly stating the condition in which such cattle and meat are found.

And no clearance shall be given to any vessel having on board any fresh beef for exportation to and sale in a foreign country from any port of the United States until the owner or shipper shall obtain from an inspector appointed under the provisions of this act such certificate.

Section 3 is as follows:

SEC. 3. The Secretary of Agriculture shall cause to be inspected, *prior to their slaughter*, all cattle, sheep, and hogs which are subjects of interstate commerce, and which are about to be slaughtered at slaughterhouses, canning, salting, packing, or rendering establishments in any State or Territory, the *carcasses or products of which are to be transported and sold for human consumption in any other State or Territory, or the District of Columbia.*

And in addition to the aforesaid inspection, there may be made in all cases where the Secretary of Agriculture may deem necessary or expedient, under rules and regulations to be by him prescribed, a post-mortem examination of the carcasses of all cattle, sheep, and hogs about to be prepared for human consumption at any slaughterhouse, canning, salting, packing, or rendering establishment in any State or Territory, or the District of Columbia, which are the subjects of interstate commerce.

Section 4 is as follows:

SEC. 4. That said examination shall be made in the manner provided by rules and regulations to be

prescribed by the Secretary of Agriculture, and after said examination, the carcasses and products of all cattle, sheep, and swine found to be free of disease, and wholesome, sound, and fit for human food, shall be marked, stamped, or labeled for identification, as may be provided by said rules and regulations of the Secretary of Agriculture.

Section 7 is as follows:

SEC. 7. That none of the provisions of this act shall be so construed as to apply to any cattle, sheep, or swine slaughtered by any farmer upon his farm, which may be transported from one State or Territory, or the District of Columbia, into another State or Territory, or the District of Columbia.

Provided, however, That if the carcasses of such cattle, sheep, or swine go to any packing or canning establishment and are intended for transportation to any other State or Territory or the District of Columbia, as hereinbefore provided, they shall there be subject to the post-mortem examination provided for in sections three and four of this act.

By the act of March 2, 1895, entitled "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1896," section 2 of the act of 1891 is amended to read as follows:

That the Secretary of Agriculture shall also cause to be made a careful inspection of *all live cattle* the meat of which, fresh, salted, canned, corned, packed, cured, or otherwise prepared, *is intended for exportation to any foreign country*, at such times and places and in such manner as he may think proper, with a view to ascertain whether said cattle are free from disease and their meat sound and wholesome, and may appoint inspectors, who shall be authorized to

give an official certificate clearly stating the condition in which such cattle and meat are found, and no clearance shall be given to any vessel having on board any fresh, salted, canned, corned, or packed beef, being the meat of cattle killed after the passage of this act, for exportation to or sale in a foreign country from any port in the United States until the owner or shipper shall obtain from an inspector appointed under the provisions of this act a certificate that said cattle were free from disease and that their meat is sound and wholesome.

Section 4 of the act of 1891 is amended to read as follows:

SEC. 4. That said examination shall be made in the manner provided by the rules and regulations to be prescribed by the Secretary of Agriculture, and after said examination the carcasses and products of all cattle, sheep, and swine found to be free of disease and wholesome, sound, and fit for human food shall be marked, stamped, or labeled for identification as may be provided by said rules and regulations of the Secretary of Agriculture.

The act also contains the following provision:

The Secretary of Agriculture is hereby authorized to make *such rules and regulations as he may decide to be necessary to prevent the transportation from one State or Territory or the District of Columbia into any other State or Territory or the District of Columbia or to any foreign country* of the condemned carcasses or parts of carcasses of cattle, sheep, and swine which have been inspected in accordance with the provisions of this act. Any person, company, or corporation owning or operating any such slaughterhouse, abattoir, or meat curing, packing, or canning establishment, or any employee of the same, that

> shall willfully violate any provision of this act shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished for each offense by a fine not exceeding one thousand dollars or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

It is thus seen that Congress has not left the States free to act upon the subject of interstate shipments of cattle. The Federal power and protection is thrown around the shipment of cattle originating in a foreign State, not only during the transit and not only while the cattle are in the stock yards waiting to be sold for slaughter and shipment to a foreign market or to a foreign State, but even while the cattle are in the hands of the packing houses, waiting slaughter for the purpose of shipment beyond the boundary of the State.

The evidence shows, without contradiction, that in pursuance of the acts of Congress above quoted the Federal Government has established inspectors at the Kansas City stock yards and at the packing houses and has assumed to its jurisdiction the cattle while in the hands of the commission men for sale and shipment. Congress has the power to do this only by virtue of the cattle *then* being subjects of interstate commerce. If the cattle are subjects of interstate commerce, then the contract and agreement embodied in the rules and by-laws of the defendant exchange operate upon and apply to interstate commerce. Whether such rules and by-laws, applying as they do to subjects of interstate commerce, constitute a contract or conspiracy in restraint of trade will next be considered.

VI.

THE ANTITRUST ACT OF JULY 2, 1890, BEING A SPECIAL ACT UNDER AUTHORITY OF THE CONSTITUTION TO PREVENT RESTRICTIONS OR BURDENS UPON INTERSTATE COMMERCE IS COEXTENSIVE IN ITS OPERATION WITH THE LIMIT OF FEDERAL POWER.

The domain of the control over commerce includes three classes of cases: First, where the control of Congress is *exclusive;* second, where the control of the States is *exclusive;* and, third, where the control of Congress and of the States may be termed *concurrent*, which embraces matters that are not national in their character and so do not require national legislation, but in which the States may act *in the absence of legislation by Congress.* (*Bridge Co.* v. *Kentucky*, 154 U. S., 204.)

Instances of the *concurrent jurisdiction* include matters which affect commerce *incidentally* and do not amount to a *regulation* of it. They are such as are local in their nature and which would require specific regulation for *each particular locality.*

In this class are included the regulation of pilots.

Cooling v. *Board of Wardens*, 12 How., 299.
Steamship Co. v. *Joliffe*, 2 Wall., 450.
Ex parte McNiel, 13 Wall., 236.
Wilson v. *McNamee*, 102 U. S., 572.

Also quarantine and inspection laws, and the policing of harbors.

Gibbons v. *Ogden*, 9 Wheat., 1, 203.
City of New York v. *Miln*, 11 Peters, 102.
Turner v. *Maryland*, 107 U. S., 38.
American Steamship Co. v. *Louisiana*, 118 U. S., 455.

Also the regulation and improvement of navigable channels.

County of Mobile v. *Kimball*, 102 U. S., 691.
Escanata Co. v. *Long*, 107 U. S., 679.
Huse v. *Glover*, 119 U. S., 543.

The regulation of wharves, piers, and docks.

Cannon v. *New Orleans*, 20 Wall., 577.
Packet Co. v. *Keokuk*, 95 U. S., 80.
Packet Co. v. *St. Louis*, 100 U. S., 423.
Packet Co. v. *Catlettsburg*, 105 U. S., 559.
Transportation Co. v. *Parkersburg*, 107 U. S., 691.
Ouchita Packet Co. v. *Aiken*, 121 U. S., 444.

The construction of dams and bridges across navigable waters of a State.

Wilson v. *Blackbird Creek Marsh Co.*, 2 Peters, 245.
Hardwell v. *American Bridge Co.*, 113 U. S., 205.
Pound v. *Turck*, 95 U. S., 459.

The establishment of ferries.

Conway v. *Taylor's Ex.*, 1 Black, 603.

Even in these matters of concurrent jurisdiction, in which the State is permitted to make regulations, the Federal authority when exercised is supreme. The action of the State is permissive only, and it is unquestionably within the power of Congress to make regulations of its own which would supersede any and all of such State regulations. In other words, in this class of cases, which are sometimes called aids or incidents to commerce, *the Federal power is supreme if Congress chooses to exercise it.*

Thus, in the case of *Minnesota* v. *Illinois* (94 U. S., 214), the power was conceded to the State to prescribe

regulations and fix charges on elevators used for the reception, storage, and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other States. While the power of the State was upheld, yet it was conceded that Congress might impose regulations of its own should it so desire. The court said:

> Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern and certainly, *until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may operate upon commerce outside of its immediate jurisdiction.*

The principle in this case has been affirmed in *Budd* v. *New York* (143 U. S., 517), and reaffirmed in *Brass* v. *North Dakota* (153 U. S., 391).

It is said in *Ouchita Packet Co.* v. *Aiken* (121 U. S., 444, 447):

> Wharfage, the matter now under consideration, is governed by the local State laws; *no act of Congress has been passed to regulate it.*

In the very recent case of *Chicago Railway Company* v. *Solan* (18 Sup. Ct. Rep., 289) the court upheld an act of the legislature of the State of Iowa, in respect to an interstate shipment, which provided that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from the liability of a common carrier or carrier of passengers which would not exist had no contract,

receipt, rule, or regulation been made or entered into." The court said:

> *So long as Congress has not legislated upon the particular subject* they are rather to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

In *Cotting* v. *Stock Yards Company* (82 Fed. Rep., 850) Judge Thayer said, in speaking of the validity of the act of the legislature of Kansas in fixing charges for yardage, etc., of the stock yards company: "The court is of the opinion that this power to fix a limit to such charges is not of such an exclusive character as to prevent the State of Kansas from exercising a similar power *in the absence of any legislation on the subject by Congress.*"

By the act of July 2, 1890, Congress, under its constitutional authority, *has assumed jurisdiction of all matters relating directly or indirectly to interstate commerce over which the Federal authority extends.* Having drawn to itself jurisdiction over matters of contracts or conspiracies in restraint of trade as well as monopolies, its jurisdiction extends not only to the class of cases in which the authority of Congress is exclusive, *but also to that class of cases where there exists ordinarily a concurrent jurisdiction.*

The extent of the Federal power in giving protection to an article imported from a sister State or from a foreign country is illustrated in a variety of cases.

In *Welton* v. *Missouri* (91 U. S., 275) it is held:

> The power continues until the commodity has ceased to be the subject of discriminating legislation

> by reason of its foreign character. That power protects it, *even after it has entered the State*, from any burdens imposed by reason of its foreign origin.

This protection was held to extend to meats from animals slaughtered in Illinois and shipped to Virginia, so as to give to the importer the right "to compete in the markets of Virginia upon terms of equality with the owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale."

> *Brimmer* v. *Rebman*, 138 U. S., 78.
> *Minnesota* v. *Barber*, 136 U. S., 313.
> *Walling* v. *Michigan*, 116 U. S., 446.

Citations might be multiplied, but it is not necessary. Instances of the exercise of the Federal power are frequently confined to cases where it was interposed to prevent hostile or discriminating legislation on the part of the State. But the occasion for its exercise is immaterial. The important fact is that the Federal power *exists for the protection of the foreign product long after it has crossed the boundary line of the State.*

In the enactment of the act of July 2, 1890, Congress must be presumed to have made its operation *coextensive with the Federal power of protection.* In other words, as far as the courts may go in protecting an imported article *from hostile legislation, so far Congress may go, and doubtless has gone by this act, to prevent combinations or conspiracies or monopolies in restraint of trade.*

Cases which are frequently cited as evidence of the power of the States over an imported article as soon as it arrives within its limits, are, when carefully considered,

illustrations of the power of the General Government over the article *even after the State may tax the article or legislate in respect thereto in the absence of legislation by Congress.*

Of this class may be mentioned the following:

Brown v. *Houston*, 114 U. S., 622.
Pittsburg Coal Company v. *Bates*, 156 U. S., 577.
Machine Company v. *Gage*, 100 U. S., 676.
Emert v. *Missouri*, 156 U. S., 296.

In the case of *Brown* v. *Houston*, a cargo of coal had arrived at New Orleans and was being peddled out in comparatively small quantities. It was held that the State might levy a tax upon it. It is apparent, however, that the Federal power and protection over it *had not ceased* and that Congress, *had it assumed jurisdiction over the particular article*, could have excluded such authority. The court says (p. 633):

> The taxing of goods coming from other States, as such, by reason of their so coming, *would be a discrimination tax against them as imports, and would be a regulation of interstate commerce* inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed.

If the Federal power may intervene to prevent a discriminating tax, must it not be said that it does so solely by reason of the article *then* being a subject of interstate commerce?

Even in *Machine Company* v. *Gage*, *supra*, it is manifest that the article was still under Federal protection, for the court says:

> In all cases of this class to which the one before us belongs it is a test question whether there is any

discrimination in favor of the State or of the citizens of the State which enacted the law. *Where there is such discrimination it is fatal.*

The same considerations controlled the court in *Emert* v. *Missouri* (156 U. S., 290). There a person engaged in peddling sewing machines imported from another State was required to pay a peddler's license. This court upheld the license on the ground that it was but the exercise of the police power of the State, and not a regulation of commerce among the States. But the conclusion is irresistible that the sewing machines in the hands of the agent were *subjects of interstate commerce*, for the reason that the court says that even as to that commodity, *under those circumstances*, a *discriminating* tax or license would be invalid.

The antitrust act, being a regulation *by Congress*, under the power given it by the Constitution, *extends to all subjects of interstate commerce so long as the article continues to be within the Federal protection*. Its restrictions are coextensive with Federal protection. Wherever it is in the power of the Federal Government, by virtue of its right to regulate commerce to protect the article against hostile legislation and discrimination, so far the article, or the commerce of which it is a part, must be free from such restraints as are prohibited by the acts of July 2, 1890.

As applied to the case at bar it is apparent any hostile or discriminating legislation on the part of the States of Kansas or Missouri affecting cattle at the Kansas City stock yards which have arrived from other States for immediate sale would be an unlawful attempt to regulate

interstate commerce, and this for the reason that the cattle were *then* under the protection of the Federal power, by reason of being *then* subjects of interstate commerce.

If the Federal power extends to them for *any purpose* does it not follow that they are embraced within the terms of the act of July 2, 1890, in which Congress assumes jurisdiction over the entire subject of interstate commerce in the matter of contracts, etc., in restraint of trade?

VII.

SOME SUGGESTIONS IN ANSWER TO THE APPELLANTS' CONTENTION THAT THE DEFENDANTS ARE NOT ENGAGED IN INTERSTATE COMMERCE.

A. From the very nature of things it must be apparent that the act of July 2, 1890, applies to contracts, combinations in the form of trust or otherwise, or conspiracies, in restraint of trade or commerce, and to the monopoly of any part of the trade or commerce among the several States, *regardless of the question whether the persons who conspire or who monopolize are engaged in interstate commerce or not.* The purpose of the act is to preserve the healthy flow of commerce in its usual and natural channels, and the prohibition of the act is aimed at any combination which *operates directly upon such commerce and restrains it or monopolizes it.*

As said by Mr. Justice Brewer in *In re Debs* (158 U. S., 581):

> If a State, with its recognized powers and sovereignty, is impotent to obstruct interstate commerce,

> can it be that any mere voluntary association of individuals within the limits of that State has the power which the State itself does not possess?

Again, in the same case, the supposition made, "If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce, etc.," gives color to our contention that it is the *obstruction* and the *restraint* that is aimed at by the act, and that the *occupation of the persons who impose such restraint is immaterial.* If the inhabitants of a State or even a great body of them should combine and conspire to obstruct interstate commerce, would any one contend that this was not a violation of the act? Would any one claim that the inquiry as to the occupation of the various persons would be pertinent or that it must first be established that they themselves were engaged in interstate commerce, before a court would listen to the complaint of the Government in an action to prevent and remove such obstruction?

In the construction placed upon the act by the various circuit courts and courts of appeal, combinations of individuals, *regardless of their occupation*, have been held to constitute a violation.

> Charge to Grand Jury, 62 Fed. Rep., 828.
> Charge to Grand Jury, 62 Fed. Rep., 840.
> *United States* v. *Ogle*, 62 Fed. Rep., 824.
> *Waterhouse* v. *Comer*, 55 Fed. Rep., 150.
> *United States* v. *Elliott*, 62 Fed. Rep., 801.
> *Thomas* v. *Rld. Co.*, 62 Fed. Rep., 803.
> *United States* v. *Cassaday*, 67 Fed. Rep., 698.
> *United States* v. *Elliott*, 64 Fed. Rep., 27.
> *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. Rep., 994; 57 Fed. Rep., 85.
> *United States* v. *Debs*, 64 Fed. Rep., 724.

Of the latter case it is said by this court (158 U. S., 600):

> It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act.

B. We believe, however, that it will appear to this court, as found by the court below, that the defendants are engaged in interstate commerce, although we submit that is not a controlling question. As said by the lower court:

> But the business of the defendants is *more than personal services; it is not merely local instrumentality in aid of commerce. Defendants are active promoters and frequently interested parties in this immense traffic. They reach out over many States and Territories by their solicitors and advertisements, and gather in for sale and sell millions of cattle, sheep, and hogs, and their rules and regulations cover the entire business and extend over the whole field of operation.*

In speaking of these very stock yards, Judge Thayer says (82 Fed. Rep., 852):

> *Much business is transacted at the Kansas City stock yards, consisting in the purchase and sale of live stock shipped to that market from other States than Kansas, which is interstate business.*

The defendant commission men, in selling live stock as the agent of the importer, which is sent from other States to the stock yards for immediate sale or reshipment to some foreign State, in reaching out over the Western country with their solicitors, seeking shipments, negotiating loans, making contracts, sending telegrams, etc., are unquestionably engaged in interstate commerce

within the meaning of the definitions heretofore given, where the subject is more particularly discussed.

But whether engaged in interstate commerce or not, the decisive fact is that they *stand at the gateway through which flows the great stream of commerce of several States and Territories and exact toll and tribute.* The territory tributary to the Kansas City market is vast. The great number of cattle raisers, who annually send millions of animals to the Kansas City market, have the constitutional right to have their traffic, which is unquestionably interstate, carried on free from restrictions, regulations, or control. *They have a right to demand free and open competition.* If, as appears from the affidavits and as was found by the lower court, the *rate of commissions* for the sale of live stock have been *doubled by the formation of this exchange*, the stock growers and stock raisers have a right to *insist* that the exchange operates upon the commerce in which they are engaged, *and tends to restrict and restrain that which, prior to the formation of the exchange, was free and unobstructed and regulated by a healthy law of competition.*

C. A number of cases are cited by the appellants upon the proposition that a charge for "services rendered or for conveniences provided" is not a regulation of interstate commerce, but may be made by the States without invading the Federal power. The citation of these cases upon this proposition is misleading. The reasonable inference from a reading of the appellant's brief on this subject would be that in all cases and under all circumstances a reasonable charge may be made by State authority, affecting interstate commerce directly or indi-

rectly, without constituting a regulation of interstate commerce.

The cases cited do not so hold. They are all of them illustrations of the rule that, as to certain matters which are not national in their character but belong to that domain where the State and Federal power have concurrent jurisdiction, the State, in the absence of legislation by Congress, may enact laws, make regulations, and fix charges. They are cases where wharfage charges and the like have been upheld, not upon the ground that charges may be made for services rendered or facilities provided in matters of interstate commerce, but upon the ground that the State in the particular instance has the power to legislate in the absence of legislation by Congress. The cases cited by appellants in their brief, pages 56 and 57, are but illustrations of this rule. The following were wharfage cases:

Packet Co. v. *Keokuk*, 95 U. S., 80.
Packet Co. v. *St. Louis*, 100 U. S., 423.
Vicksburg v. *Tobin*, 100 U. S., 430.
Packet Co. v. *Catlettsburg*, 105 U. S., 559.
Transportation Co. v. *Parkersburg*, 107 U. S., 691.
Ouachita Packet Co. v. *Aiken*, 121 U. S., 444.

Again, the State has the power to improve a navigable river and make a reasonable charge upon the shipping in the absence of legislation by Congress. Such was the case of *Huse* v. *Glover* (119 U. S., 543), cited by appellants.

The rule is well stated in *Ouachita Packet Co.* v. *Aiken* (121 U. S., 444, 447), where the court said:

> The case is clearly within the principles of the former decisions of this court, which affirmed the

right of a State, in the absence of regulation by Congress, to establish, manage, or carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce. We may particularly refer to the recent cases of *Transportation Co.* v. *Parkersburg* (107 U. S., 691), *Morgan Steamship Co.* v. *Louisiana* (118 U. S., 455), and *Huse* v. *Glover* (119 U. S., 543), in which most of the former decisions involving the same principle are cited and referred to. The first of these was a case of wharfage; the second, one of quarantine, and the third that of a lock in Illinois River constructed by the State of Illinois in aid of navigation. The same principle was applied and enforced in the cases of *Cooley* v. *Board of Wardens of Philadelphia* (12 How., 299), on the subject of pilotage; in *Mobile* v. *Kimball* (102 U. S., 691), where a State law provided for the improvement of the river and harbor of Mobile; in the various cases of bridges over navigable rivers which have come before this court, and which are reviewed and approved in *Escanaba Co.* v. *Chicago* (107 U. S., 678), and in *Turner* v. *Maryland* (107 U. S., 38), which related to the inspection of tobacco. The same principle was reaffirmed, with the limitations to which its application is subject, in the recent case of *Robbins* v. *Shelby Taxing District* (120 U. S., 489, 493). In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States can not, as such, interfere with the regulations made by the State, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded or for the services rendered under State authority. * * *

Wharfage—the matter now under consideration—is governed by the local State laws. No act of Congress has been passed to regulate it.

The whole matter is ably summed up in the case of the *Covington Bridge Co.* v. *Kentucky* (154 U. S., 204), as follows:

> The power of Congress over commerce between the States and the corresponding power of individual States over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the States with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to Congress and those in which the action of the State may be concurrent. The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States can not interfere at all. * * *

It is very obvious that the class of cases cited by counsel under this heading, being those of what may be termed concurrent jurisdiction, shed very little light upon the case at bar. The regulation of pilots, quarantine, inspection laws, and the policing of harbors, the improvement of navigable channels, the regulation of wharves, piers, and docks, etc., are matters of local concern. They are not national in character; they affect commerce but incidentally. The jurisdiction of the State and of the National Government is concurrent, in the sense that the State may act if Congress does not.

The States may make reasonable charges for facilities afforded in this manner.

But the moment that Congress acts, the jurisdiction of the States is at once ousted. If Congress should see fit to pass a law regulating ferries, wharves, pilots, etc., in various localities, it will scarcely be contended that, after such legislation, the State would have any power or authority over the matter.

In the case at bar jurisdiction has been asserted by the General Government. So far as interstate commerce is concerned, Congress has enacted that it must be free, unrestricted, untrammeled, and unobstructed. Having assumed jurisdiction to itself, no other power or authority can affect it or interfere with it.

D. It is further contended by the appellants that they are not engaged in commerce; that, at most, they are *mere aids to commerce*; that the effect of their business on interstate commerce is indirect and incidental and does not amount to a regulation.

Nathan v. *Louisiana* (8 Howard, 73), cited by appellants, involved the legality of a tax on exchange and money brokers. The brokers' business was limited to foreign bills of exchange. The tax was upheld upon the ground that the business of the brokers, which was that of drawing foreign bills of exchange and charging a premium therefor, was *not commerce*, and therefore the brokers were not engaged in commerce at all.

The court says:

> A bill of exchange is *neither an export nor an import*. It is not transmitted through the ordinary channels of commerce, but through the mail. It

is a note merely ordering the payment of money, which may be negotiated by endorsement, and the liabilities of the names that are on it depend on certain acts to be done by the holder when it becomes payable.

The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less as the rate of exchange shall be between the place where it is drawn and where it is payable. The rate is principally regulated by the expense of transmitting the specie from the one place to the other, fixed somewhat by the demand and supply of specie. Now, the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a State in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on.

Similar in principle is the case of *Paul* v. *Virginia* (8 Wall., 168), cited by appellants, in which a State statute was upheld providing that an *insurance* corporation of a foreign State must first obtain a license before doing business in Virginia. The business of insurance, like the business of drawing and negotiating foreign bills of exchange, is held by the court *not* to constitute commerce. The court says:

The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are

> simply contracts of indemnity against loss by fire, entered into between the corporations and the insured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having existence and value independent of the parties to them. *They are not commodities, to be shipped or forwarded from one State to another and then put up for sale.* They are like other personal contracts between parties, which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States.

The distinction is again made prominent in the *Trade-Mark Cases* (100 U. S., 82, 95), where, referring to *Paul* v. *Virginia*, the court says:

> This court held that a policy of insurance made by a corporation of one State on property situated in another was not an article of commerce, and did not come within the purview of the clause we are considering. "They are not," says the court, "commodities to be shipped or forwarded from one State to another and then put up for sale."

The relevancy of these cases, cited and apparently relied upon by appellants, is not apparent. They hold that persons who are engaged in a business which is not commerce are not engaged in interstate commerce. They can have no application to a case like the one at bar, which involves "commodities to be shipped or forwarded from one State to another and then put up for sale."

VIII.

THE BY-LAWS OF THE DEFENDANTS CONSTITUTE A CONTRACT OR CONSPIRACY IN RESTRAINT OF TRADE OR COMMERCE.

Having shown that the rules and by-laws of the defendants operate upon commerce among the several States, it remains to be seen whether such rules and by-laws constitute a "contract or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce."

It is not simply a question whether the combination of the defendants is void *at common law* as *an unreasonable restraint of trade or commerce*, but it is a question whether *under the terms of the antitrust act* the agreement constitutes a restraint of trade, reasonable or unreasonable.

A. The rules of the defendants, establishing a minimum commission charge, operate upon an article of *prime necessity*. The charge enters into and becomes a part of the price for which this food product is sold. The commission charged under the rules of exchange is 50 cents per head for cattle, and the overwhelming evidence shows that while there was a *nominal price* of 50 cents charged by commission men prior to organization of the exchange, yet in fact and in practice, as found by the lower court, a commission of only *25 cents*, or only 50 per cent of the present charge, was the amount then generally exacted. This was regulated by a system of rebates, the nominal price being charged and afterwards rebated; from which we may infer that there was an agreement among the members, in reference to commission, which was more

usually honored in the breach than in the observance. The organization of the present exchange is unquestionably due to a desire on the part of the commission men to establish a more rigid rule, and to prevent its violation by heavy penalties, and to prevent any one from doing a commission business except in compliance with such rules.

The organization of the exchange, therefore, *has had the effect to advance the price of food products;* and the present existence of the exchange, with its minimum commission charges, operates to *maintain such increased prices.*

Even at the common law any contract or combination which had the effect of *stifling competition* and fixing *arbitrary prices* on articles of *prime necessity*, not based upon the law of supply and demand, was illegal. This was conceded to be the law in the Trans-Missouri Case in the court of appeals, where (58 Fed., 58) Judge Sanborn says:

> Turning first then to the decisions, we find that it has long been settled *that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the people to restrict or monopolize their supply or enhance their price*, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, *are illegal restraints of trade and void.*

Or, as stated by the Supreme Court in *De Witt Clothing Co.*, v. *New Jersey Clothing Co.* (14 N. Y. Supp., 277):

> The people have a right to the *necessaries* and *conveniences* of life, *at a price determined by the edu-*

tion of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition.

The following is a partial list of the articles that have been held by the courts in the cases cited below to be of such *general importance* and *necessity* that an attempt to control their price or production is illegal, regardless of the reasonableness of the restrain imposed:

Coal, gas, matches, lumber, cotton bagging, butter, grain, salt, alcohol, candles, milk, preserves, cloth, grain bags, harrows.

Morris Run Coal Co. v. *Barclay*, 68 Pa. St., 173.
Arnot v. *Coal Co.*, 68 N. Y., 568.
Gibbs v. *Consolidated Gas Co.*, 130 U. S., 408.
People v. *Gas Co.*, 130 Ill., 268.
Chicago Gas Light Co. v. *People's Gas Light Co.*, 121 Ill., 530.
Richardson v. *Buhl*, 77 Mich., 632.
Santa Clara Valley Mining Co. v. *Hayes*, 76 Cal., 387.
India Bagging Association v. *Kock*, 14 La. Ann., 167.
Chappin v. *Brown*, 83 Ia., 156.
Craft v. *McConoughy*, 79 Ill., 346.
Central Ohio Salt Co. v. *Guthrie*, 35 Ohio St., 666.
Clancy v. *Salt Co.*, 62 Barb., 395.
State v. *Neb. Distilling Co.*, 29 Neb., 700.
Emery v. *Ohio Candle Co.*, 47 O. St., 320.
Chicago Milk Shippers' Association v. *Ford*, 4th Nat. Corp. Rep., 300.
American Preservers' Trust v. *Taylor Mfg. Co.*, 46 Fed., 152.
Hilton v. *Eckersley*, 6th El. & Bl., 47.
Pacific Factory Co. v. *Adler*, 90 Cal., 110.

Strait v. *National Harrow Co.*, 18 N. Y. Supp., 224.

It needs neither argument nor citation of authority to prove that cattle and meat products are necessary articles of *prime importance*, and that any combination tending to restrict or limit competition therein would, *even under the rules of the common law*, be illegal and void as an unreasonable restraint of trade.

The rules and by-laws of the defendants prevent competition. They prevent the owner of cattle from contracting in open market for the services of commission men to make a sale of his cattle, as he was able to do prior to formation of the exchange, but compel him to be satisfied with and pay an artificial price.

"*Competition*," says the court in the Trans-Missouri Case, "*free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life.* Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; *yet, balancing the benefits against the evils, the law of competition remains as a controlling element in the business world.*"

This rule is almost as old as the law itself. In *Mitchell* v. *Reynolds* (1 P. Williams, 181) Chief Justice Parker said that "to obtain the sole exercise of any trade throughout England was a monopoly and a crime."

In *Hooker* v. *Vandewater* (4 Den., 349) the court said:

> It is a familiar maxim that *competition is the life of trade.* It follows that whatever destroys or *even*

relaxes competition in trade is injurious if not fatal to it.

"Public policy," says Judge McIlvaine, in *Salt Co.* v. *Guthrie* (35 O. St., 666), "unquestionably favors *competition in trade* to the end that its *commodities may be afforded to the consumer as cheaply as possible*, and is opposed to monopolies which tend to advance market prices to the injury of the general public."

A case very much in point is *More* v. *Bennett* (140 Ill., 69), where it is said:

> A combination or conspiracy among a number of persons engaged in a particular business *to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition, is contrary to public policy, and the courts will refuse their aid to the enforcement of contracts by which such combinations are sought to be effected.*

This rule was applied to an association of *stenographers*, whose articles of association *regulated the price of reporting legal proceedings in shorthand.* The rates established by said association were as follows:

> Not less than 20 cents per folio for single copy; not less than 25 cents per folio for two copies; not less than 28 cents per folio for three copies; and the rate of $10 per day for attendance.

After citing authorities holding that such combination is unlawful and in restraint of trade, the court says (p. 79):

> Counsel seek to distinguish this case from those cited by the circumstances alleged in the second

count of the declaration, that but a *small portion of the law stenographers of Chicago belong to said association*. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of the trade which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into *by a vendor of a business and its good will*, with his vendee, by which the vender agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case there is *no purchase or sale* of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the *same business within the same territory*, and the object of the association is purely and simply *to silence and stifle all competition as between its members*. No equitable reason for such restraint exists, the only reason put forward being that under the influence of *competition* as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized *for the purpose of putting an end to all competition, at least as between those who could be induced to become members*. True, the restraint is not so far-reaching as it would have been if *all* the stenographers in the city had joined the association, but so far as it goes it is precisely of the same character, produces the same results, and is subject to the same legal objection.

It may also be observed, by the constitution of the association, any reputable stenographer regularly

engaged in law reporting in Cook County is eligible to membership, *and if all or a major part of the stenographers in said county engaged in that business are not already members, it is because the association has not yet fully accomplished the purpose of its organization.* We can see no legal difference between the *restraint upon competition which it now exercises* and between that which it *will exercise* when it is in a position to dictate terms to *all who are engaged in the business* and to all who may wish to obtain the services of law stenographic reporters.

It is to be noted that the case of *More* v. *Bennett* is directly in point and is closely analogous to the case at bar. If a schedule of prices for stenographic reporting is unlawful, when made by an association of stenographers, it is difficult to see how a fixed schedule of commissions entered into by an association of commission men can be held to be lawful. The case of *More* v. *Bennett* has been cited and followed in a number of cases, among which are the following:

Nestor v. *Brewers' Association*, 29 Atl., 102.
People v. *Chicago Live Stock Exchange*, 48 N. E. Rep., 1062.
Jackson v. *Stanfield*, 137 Ind., 592.
American Fire Ins. Co. v *State*, 22 So. Rep., 99.
Milwaukee Masons and Builders' Association v. *Niezorowski*, 70 N. W. Rep., 166.

In *Texas Standard Oil Co.* v. *Adoue* (83 Tex., 650) a contract was made by the owners of five cotton-seed oil mills, whereby prices of seed cotton were fixed and the markets where each was to buy named, and the prices to

be charged only stipulated. This was held to be an unlawful combination on the ground that the tendency was to create a *monopoly* and *stifle competition*. The court said:

> But to render a contract void it is not necessary that it should create a pure monopoly. It would seem that the agreement may be illegal if the *natural or necessary consequences* of its operation are to *prevent competition and create fictitious prices* independent of the law of supply and demand, and to such an extent as to injuriously affect the interests of the State or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restrictions imposed by the contract.

In *Morris Run Coal Co.* v. *Coal Co.* (68 Pa. St., 673) (a case much quoted) five coal companies of Pennsylvania entered into an agreement to divide two coal regions of which they had control; to appoint a committee to take charge of their interests, which was to decide all questions, and appoint a general agent at Watkins, N. Y.; the coal mined to be delivered through him; each corporation to deliver its proportion at its own cost in the different markets, at such time and to such persons as the committee might direct; the committee to adjust the prices, rates of freight, etc.

The vice of this contract was said to be that by it "they control the price of coal in this extensive market and make it bring sums it would not command if left to the *natural laws of trade;* that it concerns an article of *prime interest* for many uses."

In *Craft* v. *McConoughy* (79 Ill., 346) a contract was entered into by grain dealers of a town, which on its

face indicated that they had formed a partnership for the purpose of dealing in grain, but the true object of which was to form a secret combination which would *stifle all competition* and enable the parties, by secret and fraudulent means, to control the price of grain, *cost of storage*, and expense of shipment. It was held that such an agreement was in restraint of trade, and consequently void as against public policy. The court said (p. 349):

> While these parties were in business in competition with each other they had the undoubted right to establish their own rates for grain stored and *commissions* for shipment and sale. They could pay as high or low a price for grain as they saw proper and as they could make contracts with the producer. *So long as competition was free the interest of the public was safe.* But the secret combination created by the contract *destroyed all competition* and created a monopoly against which the public interest had no protection.

In *Arnot* v. *Pittston Coal Co.* (68 N. Y., 558), the defendant and another company were corporations engaged in mining and selling coal at or near Pittston, Pa. The two companies entered into a contract by which the defendant agreed to take all the coal which the B. C. company should desire to send north of the State line, not to exceed 2,000 tons per month, at the regular market price, less a *commission* of 15 per cent, and the B. C. company agreed not to sell any coal to any party other than defendant to go north of the State line. The product of the B. C. company largely exceeded 2,000 tons per month. Defendant had made similar contracts with all other mining proprietors. The agreement was held

void as against public policy and in restraint of trade. The court said (p. 564):

> The purpose of the defendant in making the contract in question was to control the shipment and supply of coal for the Elmira market, so as to maintain *an unnatural high price of coal* in that market, and to *prevent competition* in the sale of coal therein.
>
> That a combination to effect such a purpose is injurious to the interests of the public and that *all contracts* designed to effect such an end are *contrary to public policy*, and therefore illegal, is too well settled by adjudicated cases to be questioned at this day.
>
> Every producer or vendor of coal, or other commodity, has the right to use all legitimate efforts to obtain the best price for the article in which he deals, but whenever he endeavors to *artificially enhance prices* by suppressing or keeping out of the markets the products of others, and to accomplish that purpose by means of a contract binding them to hold their supplies, such arrangements are even more mischievous than combinations not to sell under an agreed price, and combinations of that character have been held against public policy and illegal. If they should be sustained, the prices of articles of *prime necessity*, such as coal, flour, and other indispensable commodities might be *artificially raised* to a ruinous extent, far exceeding any natural result from the operation of supply and demand.

The evil effects of combinations to stifle competition are well stated in the case of *Commonwealth* v. *Carlisle*, (Brightley's Report, 36), where it is said:

> I take it, then, a combination is criminal wherever the act to be done has a tendency to *prejudice the public* or to oppress individuals by unjustly

subjecting them to the power of the confederates, and give effect to the purposes of the latter, whether of extortion or of mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to *artificial means* by either side, is criminal. The effort of an individual to disturb this equilibrium can never be perceptible nor carry the operation of his interest or that of any other individual beyond the limits of fair *competition;* but the increase of power of combination being in geometrical proportion to the number concerned, an association may be able to give an impulse not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act which would be perfectly innocent, at least in a legal view, when done by an individual.

A contract by which two railway companies agree to exchange their traffic and not to connect with or take business from or give business to any railroad which may be constructed in Colorado or New Mexico after the date of the agreement, is held (*Denver R. R. Co.* v. *Atchison Co.*, 15 Fed. Rep., 650) against public policy and void. The court (Halleck, J.) says:

It is enough to say that it is a conspiracy to grasp commerce and suppress the building of railroads in two great States. Similar provisions have fallen under the condemnation of other courts, whose judgment of them has been clearly expressed. An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in similar business out of the association, has a tendency to increase the price of carriage and to *suppress competition*, and is therefore illegal.

No stronger case can be found illustrating the rule, that in articles of *prime necessity* no combination or agreement whatever is permissible which tends, even remotely, to prevent competition, than the case of *Gibbs* v. *Consolidated Gas Company of Baltimore* (130 U. S., 397). There an agreement had been made between two gas companies. The contract recited that "active competition between the two companies had resulted in expense, annoyance, and loss of profits," and it was therefore provided that the price of gas to consumers should be placed at $1.75 per thousand cubic feet, with a rebate of 15 cents a thousand feet for payment within seven days, unless the rate should be changed by mutual agreement of the parties thereto in writing. The court held that such an agreement was against public policy as conspiracy in restraint of trade, saying:

> The supplying of illuminating gas is a business of *public nature* to meet a *public necessity*. It is not a business like that of the ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. (Citing authorities.)
>
> Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, yet in the instance of business of such character that it presumably can not be restrained *to any extent whatever* without *prejudice to the public interest*, courts decline to enforce or sustain contracts imposing such restraint, *however partial*, because in contravention of public policy.

It was pointed out by the court that the early English decisions were somewhat at variance with this rule, but

that they should not be regarded as controlling, since they were made "under a condition of things and a state of society different from those which now prevail."

The operation of the law of supply and demand and of competition may sometimes result in hardship in particular instances, but this does not alter the rule. As said in *De Witt* v. *Cloth Co.* (14 N. Y. Supp, 277):

> With the results naturally flowing from the laws of supply and demand, the courts have nothing to do; but when agreements are resorted to *for the purpose of taking trade out of the realm of competition*, the courts can not be successfully invoked.

The gist of the illegality is a *combination* with *power* to *affect* and *control prices*. Whether prices have in fact been raised is not controlling. In *Richardson* v. *Buhl* (77 Mich., 632), the court had under consideration a corporation organized for the purpose of controlling the manufacture and sale of matches, by means of which scheme all competition was stifled. The court said:

> It is no answer to say that this monopoly has *reduced* the price of friction matches. That policy may have been necessary to *crush competition*. The fact exists that it rests in the discretion of the corporation at any time *to raise the price to an exorbitant degree*. Such combinations have frequently been condemned by courts as *unlawful* and as *against public policy*.

This principle is tersely stated by this court in the Trans-Missouri Case, in the following language:

> In this light it is not material that the price of an article may be lowered. *It is in the power of the combination to raise it.*

These suggestions apply with peculiar force to the exchange here in question. If the defendant commission men have the power to regulate the prices to be charges as commissions, and which are paid by the shipper as a condition of shipment to this market, *who shall place a limit upon their power in this regard?* If they provide in their by-laws for a charge of $5 per head, who shall say that this is excessive? If the combination may not be permitted to exact a charge of $5 per head, how can it be said that they may agree upon 50 cents per head since the *vice* consists in the *combination* and in the *power lodged in the combination* to fix the price?

In *Santa Clara Lumber Co.* v. *Hayes* (76 Cal., 387), it appeared that the plaintiff and defendants, who were manufacturers of lumber, entered into a contract by the terms of which the defendants agreed to make and deliver to plaintiff during the year 1881 2,000,000 feet of lumber at $11 per thousand feet, and further agreed not to manufacture any lumber during such period for sale within a specified territory except under the contract, and to pay plaintiff $20 per thousand feet for any lumber manufactured and sold to parties other than the plaintiff. Similar contracts were made by plaintiff with other lumber dealers, and the sole object and consideration in entering into such contracts was to form a combination for the purpose of increasing the price of lumber, limiting the supply, and giving it control of the lumber market within the territory specified. It was held that

the contract was in restraint of trade and void. The court said:

> Among the contracts illegal under the common law, because opposed to public policy, were contracts in general restraint of trade; *contracts between individuals to prevent competition and keep up the prices of articles of utility.*
>
> Plaintiff had an undoubted right to purchase any and all the lumber it chose and to sell at such prices and places as it saw fit; but when, as a condition of purchase, *it binds its vendor not to sell to others*, under a penalty, it transcended a rule the adoption of which has been admitted by the experience and wisdom of ages as essential to the *best interests* of the community and as necessary to the protection alike of individuals and legitimate trade.

In *India Bag Association* v. *Kock* (14 La. Ann., 167) an agreement was entered into by several commercial firms by which they bound themselves for the term of three months not to sell any India cotton bagging except with the consent of a majority of them. It was held by the court that the combination was in restraint of trade, using this language:

> This is a case which never ought to have come before us. The agreement between the parties was *palpably* and *unequivocally* a *combination in restraint of trade*, and to enhance the price in the market of an article of *prime necessity* to cotton planters. Such combinations are contrary to public order, and can not be enforced in a court of justice.

When the business is of a public character, such as in the case at bar, as will be hereafter considered, the courts

with one voice condemn any efforts to prevent competition. Thus, in the case of *People* v. *Chicago Gas Trust Company* (130 Ill., 268) the various gas companies in the city of Chicago combined, the Chicago Gas Trust Company purchasing the stock in the other corporations. This was held to be a contract in restraint of trade, and as tending to create a monopoly. The court said, page 292:

> The business of manufacturing and distributing illuminating gas by means of pipes laid in the streets of a city is *a business of a public character.* It is the exercise of a franchise belonging to the State. The services rendered and to be rendered for such a grant are of a *public nature.* Companies engaged in such business *owe a duty to the public.* Any unreasonable restraint upon the performance of such duty is prejudicial to the public interest and in contravention of public policy.
>
> *Whatever tends to prevent competition between those engaged in a public employment or business, impressed with a public character, is opposed to public policy, and therefore unlawful.* Whatever tends to create a *monopoly* is unlawful as being contrary to public policy. (Citing authorities.)

It is immaterial what may be the ostensible and declared purposes of a combination. They may be ever so high sounding. The court looks at the matter of substance. Thus, in *People* v. *Sugar Refining Company* (54 Hun, 354) the ostensible purposes of that combination were to promote economy of administration, to give each refiner the benefit of all advantages and practices known to or used by others to improve the quality and diminish the cost of production, to furnish protection

against unlawful combinations of labor and against inducements to lower the standard of refining sugars. It was held nevertheless that the combination was unlawful and in restraint of trade. The court said:

> Where that (an effort to prevent competition) appears to be the fact, the agreement, association, combination, or arrangement, or whatever else it may be called, having for its objects the *removal of competition* and the *advancement of prices of necessaries of life*, is subject to condemnation of the law, by which it is denounced as a criminal enterprise.

Free competition is not only the rule of the law in respect to the sale of commodities, but also applies to combinations whose object is to affect the price of wages. Thus, in *People* v. *Fisher* (14 Wendell, 1), which is a leading case, the court says:

> Combinations and confederacies to enhance or reduce the prices of *labor* or of *any articles of trade or commerce* are injurious.

Combinations which "arrogate to themselves the exercise of powers destructive to the right of *free competition*" are illegal, and it is also said that "their aggregate power and influence imperil the free and pure administration of justice." (*National Harrow Company* v. *Quick*, 67 Fed. Rep., 130.)

Contracts in partial restraint of trade which have been upheld have usually been contracts involving the sale of a business whereby the vendor agrees for a certain limited period of time and within a certain limited territory not to engage in the same business again. Such contracts

are upheld upon the ground that there is a valid consideration for them and that such partial restraint is necessary for the proper enjoyment by the vendee of the good will purchased. Where, however, there is no consideration and no sale of business, as in the case at bar, the unbroken line of authorities is to the effect that the contract is void.

Thus, in *Nester* v. *Brewing Company* (Pa.) (29 Atl. Rep., 102) it was held that a combination among a number of brewers of a city to control the price of beer within the city was illegal, being in restraint of trade. The court said:

> Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good will with the vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case *there is no purchase or sale of any business*, nor any other valid circumstances giving to one party a just right to be protected against competition from the other. All the parties of the association are engaged in the *same business*, within the *same territory*; and the object of the association is purely and simply *to silence and stifle all competition as between its members*. No equitable reason for such restraint exists. (*Moore* v. *Bennett*, 140 Ill., 69.)

The same rule is thus stated in *Fox Steel Co.* v. *Schoon* (77 Fed. Rep., 29):

> A contract between manufacturers whereby, *without any sale of a business* of one to the other, one

party is prohibited from manufacturing of pressed metal any parts of a diamond car-truck frame is void as an unreasonable restraint of trade.

It is unlawful for any number of persons engaged in business, whether commission business or commerce, *to surrender the control over their own business* and vest it in trustees or directors or a committee. This was attempted in *Bishop* v. *American Preservers Co.* (157 Ill., 284), where it was held that:

> An agreement providing for the *welding together* of all the interests in a certain business into *one giant combination or partnership* under the absolute dominion and control of a board of trustees is void as contrary to public policy.

What better description of the live-stock exchange in this case can be given than to say it is the "*welding together of all the interests engaged in a certain business into one giant combination or partnership under the absolute dominion and control of a board of trustees.*"

No line of business is exempt from this rule. "Any combination or agreement, the object of which is to destroy or interfere with *free competition* in *any* line of business is void, *whether or not in the particular business it has the desired effect.*" (*Anderson* v. *Jett*, 89 Ky., 375.)

Any combination which has for its object "fictitious and unnatural" prices is declared to be "hazardous to the comfort of the community." (*Raymond* v. *Leavitt*, 46 Mich., 447.)

"Agreements which, in their necessary operation upon the action of the parties, tend to *restrain their natural rivalry* and *competition*, and thus to result to the disadvantage of the public or third parties, are against the

principles of sound public policy and are void." (*Hoffman* v. *McMullen*, 83 Fed., 372.)

In *Texas and Pacific Coal Co.* v. *Lawson* (34 S. W., 919) it appeared that the Texas antitrust act denounced as void and prohibited the enforcement at law or in equity of every contract whereby a combination of capital, skill, or arts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities. It was held that this act rendered void a lease by a coal company of its saloon, in which the lessor covenanted not to permit the sale of liquor by anyone else on its lands and to issue to its employees checks in payment of wages, and redeem all checks it issued which the lessee might take in payment for liquors in consideration for the payment of rent of two-thirds of the profits of the business. In speaking of the statute the court said:

> *The statute ignores the common law distinction between restrictions which are reasonable and those which are not, and the commodities which are a prime necessity and those which are not.*

In *Texas Brewing Co.* v. *Anderson* (40 S. W., 737) it is said:

> A contract by which the buyers agree to keep for sale *no beer except that furnished by the seller*, and the seller agrees *to sell to no other persons at two certain towns*, is within the Revised Statutes of 1895, avoiding contracts to restrain trade or prevent competition in the sale of commodities.
>
> *Texas Brewing Co.* v. *Templeman*, 38 S. W., 27.
> *Fuqua* v. *Pabst Brewing Co.*, 38 S. W., 29.
> *Texas Brewing Co.* v. *Meyer*, 38 S. W., 263.

In *National Harrow Co.* v. *Hench* (83 Fed. Rep., 36) it appeared that numerous manufacturers owned various United States patents of spring-tooth harrows, and agreed to organize a corporation; to assign to it all the patents then owned or thereafter to be acquired, and the good will of their business, and not to be interested in the manufacture or sale of such harrows except as agents or licensees of the corporation; that the corporation should license them to manufacture and sell, for their own account, subject to uniform terms and conditions, their respective makes; that each licensee should pay $1 for each such harrow manufactured and sold by him, and should receive paid-up stock in return for the patents and good will. Those who entered the agreement represented 70 per cent of the total manufacture and sales of the United States. It was held that the arrangement was an unlawful combination in restraint of trade. The court said:

> It is manifest, as well from the contract as from the *proofs outside of it*, that the purpose of the parties was to form a combination between the various manufacturers of these harrows to *prevent competition in business* and enhance prices, and such is the effect of their agreement. That such a contract would be *unlawful* seems *clear*. Citing
>
> *Nester* v. *Brewing Co.*, 161 Pa. St., 473.
> *Carbon Co.* v. *McMillin*, 119 N. Y., 46.
> *Morris Run Coal Co.* v. *Coal Co.*, 68 Pa. St., 173.
> *Distilling Co.* v. *People*, 41 N. E., 188.
> *Straight* v. *Harrow Co.*, 18 N. Y. Supp., 233.
> *Harrow Co.* v. *Quick*, 67 Fed. Rep., 130.

Efforts to restrain competition are so universally regarded as hostile to the welfare of the people that

practically all of the States have enacted statutes prohibiting combinations in restraint of trade or to restrain competition, and prohibiting monopolies or attempts to monopolize. So odious had such combinations become that in 1891, prior to the Populist regime, the State of Kansas (laws of 1891, p. 294) had passed an act "prohibiting combinations to prevent competition among persons engaged in buying or selling live stock, and to provide penalties therefor." Section 1 is as follows:

> That it shall be unlawful for any two or more persons or corporations in this State, engaged in the business of buying or *selling live stock for others on commission, to enter into any combination, agreement, or arrangement for the purpose of or which tends to fix or control the charges or commissions to be demanded or received by such persons or corporations for their services for the sale of live stock.*
>
> SEC. 2. That it shall be unlawful for any person or persons, or corporation or corporations, *engaged in buying or selling live stock for others upon commission*, to continue with or enter into any agreement or arrangement with any person or persons, or corporation or corporations, engaged in the business of purchasing live stock, either for themselves or upon commission, either for themselves or as the agents of others, which shall have for its purpose or in any respect tends *to prevent full and free competition in the business of selling live stock upon commission for others*, or which has for its purpose or tends to the *fixing or maintaining of any sum as a minimum commission for services of selling live stock for others.* And it shall be unlawful for any person or persons, or corporation or corporations, doing business in this State to be or become a member of any society, association, or corporation whose by-laws provide for a

fixed or minimum commission for the selling of live stock for others, or whose by-laws *prohibit its members from purchasing live stock from persons who are not members of such society*, association or corporation; and all such by-laws of any society, association, or corporation doing business in this State *are hereby declared illegal and void*, and any person attempting, directly or indirectly, to enforce or make the same operative or effectual shall be deemed guilty of a misdemeanor; and any corporation which shall attempt to have any such by-laws enforced, or shall obey such by-laws and refuse to buy from others on account of such by-laws, shall, in addition to the penalties hereinafter provided for, forfeit its charter.

Section 3 provides penalties of fine or imprisonment, or both, for a violation of the act.

The State of Missouri also has a statute against "pools, trusts, and conspiracies," enacted April 2, 1891, amended April 11, 1895, and again amended March 24, 1897, which prohibits—

All arrangements, contracts, agreements, or combinations between all persons or corporations, or between persons, or any association of corporations and persons, designed or made with a view to lessen or which shall tend to lessen full and free competition in the importation, manufacture, or sale of any article, product, or commodity in this State, and all arrangements, combinations, contracts or agreements, whereby or under the terms of which it is proposed, stipulated, provided, agreed or understood that any person or association of persons or corporations, doing business in this State, shall deal in, sell or offer for sale in this State any particular or specific product or commodity, and shall not, during the

> continuance or existence of such arrangement, combination, contract or agreement, deal in or offer for sale in this State any competing article, product or commodity.

The act also provides penalties for "any corporation or any partnership or individual, or other association of individuals whatsoever, who shall create, enter into, or become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons to regulate or fix a price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product in mining, or any article or thing whatsoever, etc."

This *very exchange*, with its *present by-laws*, was held to be *illegal* and its members "*criminals*" in *Greer* v. *Payne* (46 Pac. Rep., 190). The actual and real purpose of its rules and by-laws, says the court:

> Is rather to *prevent competition* along certain lines among those engaged in the *live stock commission business*, and to *maintain uniform minimum prices for their services*. * * * These and other rules of a like character are apparently the *main features* of this organization which makes a *membership therein so valuable*. The exchange makes no pretense of giving direct aid to its members in securing business, but leaves that to their own individual efforts. Its profitableness, however, is no doubt greatly augmented by reason of the *fixing of charges by a combination which is powerful enough to monopolize such services*. An organization having such objects is an *unlawful combination*, which is expressly prohibited by law. * * * The organization itself will

continue with unimpaired ability to violate the law and with impunity to trample upon the public interests. These parties have, by their voluntary acts, created an organization which the law condemns and *with which no man can be connected without being answerable to the laws of his State as a criminal.*

We submit that the following remarks of the lower court in this case are pertinent and wholly warranted by the evidence:

> The *object* and *purpose* of the exchange *is written across its face where all can read.* It is to *control* and *monopolize* the *entire business of buying and selling live stock at the Kansas City stock yards.* It is clearly *a combination to restrict, control, and monopolize that class of trade and commerce.* The defendants declare that the rules, regulations, and prices for doing the business are all reasonable and fair and for the best interests of buyer and seller. Possibly that is so, although it is not apparent, looking at the interests of the stock grower or purchaser, why the *number of solicitors* of business should be limited to three for each firm, or why there should be a *restriction in telegraphic information* as to the state of the market, or why he should be compelled to pay a commission of *50 cents* a head on cattle when he paid *25 cents before the exchange was organized*, or why there should be discriminating charges on stock from different localities.

The supreme court of Illinois, as recently as last December, held that certain rules of the Chicago Live Stock Exchange (identical with one of the rules now under consideration) were illegal and void, because "*it trammels competition and prohibits an individual from contracting and engaging in business and using such agencies and*

means as he may desire which are not hostile to general law," and leave was granted to file an information in the nature of *quo warranto* to forfeit the charter of the corporation.

Much is said in appellant's brief upon the subject of exchanges, they apparently basing their argument of the validity of this exchange upon the fact that exchanges have always existed, and that they are necessary to promote the trade and commerce of the country, and therefore can not be unlawful. This contention will be considered under another heading. At present, however, we may with propriety call the court's attention to the fact that there appears to be no magic in the word "exchange" which exempts its members from such punishment as is visited upon ordinary offenders against law. It seems to be the rule of various courts that *even as to members of an exchange* the question after all is as to the *validity* and *legality* of their by-laws and proceedings, and only such will be upheld as are *within the pale of the law.*

That the fact that certain persons organized under the name of an exchange did not afford them immunity from the law prohibiting contracts in restraint of trade was stated in *People* v. *Milk Exchange* (N. Y. Ct. of App., 39 N. E., 1062). There a company composed of a large number of local milk dealers incorporated as a milk exchange for the ostensible purpose of buying and selling milk at wholesale and retail, but they only acted as the seller's agents to find purchasers, charging the former *a commission for such service,* and adopted and acted under a by-law giving the board of directors the power to fix a price to be paid by the stockholders for milk.

The court of appeals of New York held this to be an *unlawful combination*. The court disposed of the case in this language:

> It may be claimed that the purpose of the combination was to reduce the price of milk, and that, it being an article of food, such reduction was not against public policy. *But the price was fixed for the benefit of the dealers and not the consumers*, and the logical effect upon the trade of so fixing the price by the combination *was to paralyze the production and limit the supply*, and thus leave the dealers in a position to *control the market*, and, at their *option*, *to enhance the price to be paid by the consumers*. This brings the case within the condemnation of the authorities to which we have referred.

Again, in *People* v. *Sheldon* (N. Y. Ct. of App., 34 N. E., 785), certain persons were convicted of conspiracy to commit acts injurious to trade, although they were associated together under the name of "The Lockport Coal Exchange." The beneficent purposes and business of this exchange were to "foster trade and commerce in coal, wood, and all the products appertaining to the same; to protect and secure freedom from unjust and unlawful exactions; to diffuse accurate and reliable information as to the retail coal trade, and of the responsibility and standing of customers, and other matters, among its members, for their mutual protection and benefit; to settle differences between its members; to produce uniformity and certainty in the customs and usages of such trade; to promote a more enlarged and friendly intercourse between merchants and dealers in coal and wood, and to provide, establish, and maintain such rules and regulations as

may be proper and necessary for the mutual cooperation, interest, and protection of the retail dealers in coal and wood in the city of Lockport, and in furthering the coal-trade interests generally."

The court disposed of the case in the following language:

> No member was permitted to sell coal *at less than the price fixed by the exchange*. The organization was a carefully devised scheme to *prevent competition* in the price of coal among the retail dealers, and the *moral and material power of the combination* afforded *a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange*. The cases of *Hooker* v. *Vandewater* (4 Denio, 349), and *Stanton* v. *Allen* (5 Denio, 434), are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court, in those cases, held that the agreements were void, on the ground that they were agreements to *prevent competition*; and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance tending to show the injury which might result from agreements to raise prices or prevent competition.

In *United States* v. *Jellico Coal Co.* (46 Fed. Rep., 432), the Government brought suit under the antitrust act

against the members of the Nashville Coal Exchange, and, notwithstanding the fact that the defendants were organized as an "exchange," they were held to be guilty of a *violation of the act of July 2, 1890.* There an agreement was entered into between coal-mining companies operating chiefly in Kentucky, and dealers in coal in Nashville, Tenn., creating a coal exchange to advance the interests of the coal business, "to treat all parties to the business in a fair and equitable manner, and to establish the price of coal, and change the same from time to time; by which it was agreed that the price of coal at the mines should be $4\frac{1}{2}$, the freight being 4 cents, and the margin of the dealer should be $4\frac{1}{2}$ cents, making the price to the consumer 13 cents, and that, whenever the price of the coal should be advanced beyond an advance in freights, one-half of the advance should go to the mine owner and the other half to the dealer, and a penalty was provided by fine of any member selling coal at a less price than the price fixed by the exchange; and by which it was forbidden for owners or operators of mines to sell coal to any person other than members of the organization, and for dealers to purchase of miners who were not members, but exempting coal used for manufacturing and steamboat purposes from the prices prescribed, until all the mines tributary to that market should come into the exchange, or until the exchange should control the prices of coal used by manufacturers.

The court held that this agreement was in violation of the act of July 2, 1890. *It is to be observed that this exchange seems to have been formed on the same general*

lines as the Kansas City Live Stock Exchange. The court says:

> The exchange ordains that "owners or operators of mines shall not sell or ship coal to any firm, person, or corporation in Nashville or West Nashville or East Nashville who are not members of this exchange, and dealers shall not buy coal from anyone who is not a member of the exchange." The coal trade is confined, so far as the market supply is concerned, to transactions between the *miner and dealer*, the prices are fixed by them, and the *miner and dealer only are eligible to membership.* The miners of the concern *can not sell to any dealer in or near Nashville who is not a party to the agreement*, nor can such dealer *purchase* coal of any miner anywhere *who is not a member of the body.* The operations of both are *confined within the membership.* So far as Nashville is concerned they can not go to cheaper or more favorable markets, or deal with those who would give more favorable terms. The restraint is *positive and undeniable.* Moreover, in the first section of the by-laws of the exchange it is asserted that "all coal used for manufacturing and steamboat purposes shall be exempt from prices made by this exchange until all mines tributary to this market shall become members of the exchange, or until the exchange can control the prices to govern coal used by manufacturers." This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steamboats whenever it could; that the miners of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely, and the necessary inference from this declaration and the entire organic structure of

> the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market, to a large extent at least, and that this exchange might now *monopolize the business of dealing in domestic coal in the Nashville market*, and in the future monopolize by and confine to its membership the *entire trade in coal at that point*. It seems to me that the purposes and intentions of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute, and that there is no need of authorities to sustain such view of the case. Regarding the act as constitutional I see no way for the defendants to escape its condemnation.

That the rules of law prohibiting combinations in restraint of trade and commerce apply to *services* as well as to other employments is specifically held in *People* v. *Medical Society* (24 Barb., 570). There a medical society established a tariff of fees for medical services to be performed by its members, and fixed a minimum salary to be received by any member who should be appointed to any public office in a professional capacity, and adopted a resolution declaring that it should be dishonorable for any member of the society to accept any payment or perform any services contained in such tariff of prices at a less sum than it was therein provided; and subsequently, in pursuance of the by-laws to that effect, *expelled* a member for violation of that regulation.

It was held that the regulation was *void*, as being unreasonable, as being against public policy, and contrary

to law, and that the expulsion of the member was unauthorized and illegal, and that a mandamus would lie directing that he be restored or recognized as a member of the medical society.

The court said:

> A by-law must not be at variance with the general law of the land. It must be reasonable and adapted to the purposes of the corporation. * * * All the purposes of the corporation can be accomplished without interfering in the least with the *natural and private rights* of each member to *agree* with the public authorities or others for *such compensation for his services as he may desire*. The rule established by the society is *unreasonable*—not that it fixed an unreasonable price for the specific service (as to that I do not know), but it is unreasonably *restraining and oppressive upon its members*. It interferes with their private rights.
>
> The regulation was not only unauthorized by the law, but it is in conflict with well-settled principles of law. It was the result of *a combination to coerce the public authorites of Erie County and the city of Buffalo to make a certain compensation for certain medical services not less than a minimum sum fixed*. Such a *combination* is, I have no doubt, *unlawful at common law*. It is in restraint of the rights of the public authorities and the individual members of the society. * * * A physician entirely competent may be *willing* to render the service for *half the sum fixed in the rules*, and yet if he adheres to the regulation he must decline the employment. The entire regulation is in conflict with the *law of the land* and can not be sustained. It conflicts with the *law and its policy in relation to contracts and trade. The law promises and encourages great freedom in contract and in trade and is constantly inviting competition.*

No matter what form the restriction may take, nor how aptly worded may be the ostensible purposes of the organization, the crucial test is *whether competition is destroyed or whether the tendency of the organization or association is to prevent competition among its members.*

Milwaukee Masons and Builders' Association v. *Niezorowski* (Wis.) (70 N. W., 166) strongly illustrates this doctrine. There the by-laws of a builders and masons' association, the membership of which included sixty out of seventy mason contractors in a city, required the members to pay to the association 6 per cent of all contracts taken by them and to submit all bids for work first to the association, and provided that the lowest bidder should add 6 per cent to his bid before it was submitted to the owner or his architect. The organization was held contrary to public policy and its by-laws void.

The court said:

> The manifest purpose of the private by-laws was, by means of the combination thus effected, *to suppress fair and free competition in bidding for building contracts in Milwaukee*, and by such combination and method of bidding, upon its face apparently fair and free from objection, but in fact unfair and delusive, to compel owners to pay for the erection of buildings the sum of 6 per cent in excess of what they would otherwise be obliged to pay if they were fairly let to the lowest bidder uninfluenced by such combination. It seems to us that the *restraint* put upon the rights of proprietors by the provisions of these by-laws or rules, as well as the entire scheme thus disclosed, is *contrary to public policy, and therefore void.* All such arrangements tend to deprive the public of the *services of parties in the employments*

and capacities in which they are most useful, and they tend to expose the public evils of monopolies. (*Richards* v. *Seating Co.*, 87 Wis., 512.)

The combination in question is contrary to public policy and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exists *no contract relations*. While all reasonable stipulations and means to protect labor and trade are laudable, we must hold that the means here sought to be employed are such as the law will not sanction. We must consider what may be done under such an agreement and the result which it will necessarily produce. As already pointed out, the operation of this combination under these private laws is to *suppress free and fair competition* in bidding for contracts, and by delusive and deceptive means members of the association are enabled to exact from owners a higher price for buildings than they would otherwise have to pay.

The vice of an association formed for the purpose of drawing to itself all the business in a particular line is forcibly illustrated and strongly condemned in *Jackson* v. *Stanfield* (36 N. E., 345), under the following state of facts:

The retail lumber dealers' association of Indiana, by its laws, gave an active member a claim against a wholesaler for selling to a person not a "regular dealer in such member's community," and provided for a hearing of the claim by a committee, and required members *to refuse to patronize a wholesaler who ignores the committee's decision*. The plaintiff, who was not a regular dealer, underbid defendant on a contract, but the wholesalers *refused to sell to him* and he was obliged to abandon the

contract because defendant, an active member of the association, had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims. It was held that the defendant was liable for the amount which plaintiff lost by abandoning his contract and would be perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff.

The court said:

> They [the rules of the association] *extend to and reach any wholesale dealer in the United States with whom the threat to withdraw the trade of 150 retail dealers can have weight.* It is shown in the finding that Michigan is the source from which most of the lumber in northern Indiana is procured, and that the rules of the association are published in pamphlet form and sent to every wholesale dealer in the United States. The retail dealers who organized this association in question are members of various cities and towns where they are located. They have lumber yards containing stock in quantity and quality suited to and commensurate with the wants of the consumers in their several localities. These gentlemen are prominent, wealthy, and influential citizens of our State, *whose power* from the elevated stations they occupy, so exercised, *enables them to control the wholesale dealers of the United States against the agents and brokers within their own territory, and effectually drive them out of business.* It is idle to say that the victim of such a combination is only incidentally affected thereby. *The object of the association and the result attained is a monopoly of trade by the owners of yards, and the broker is simply ignored by the wholesale dealers.*

A combination between two classes of business men whose interests are *naturally antagonistic* is especially vicious, as shown in the preceding case. It is bad enough for members of a certain class—for example, commission men—to combine to regulate their charges, and say that *no one else shall engage in the same business without joining their association and consenting to rules which are in themselves illegal*, but it is *far worse* and *far more reprehensible*, from a legal standpoint, when a class of men—as, for example, commission men—form a combination *with the very persons with whom they have to deal as business antagonists, and so harmonize the conduct of their business and provide that none but their members shall enjoy such trade.*

It must be constantly borne in mind that the defendant association is not only composed of *commission men*, but that it also includes and comprehends *all of the packing houses*. The interests of the commission men and of the packing houses are naturally *antagonistic* when *unaffected by artificial conditions*. It is to the interest of the packing houses to deal with the commission man who furnishes *the most efficient service* and offers his wares *at the lowest prices* regardless of the question of his membership in any association. The two classes of persons naturally deal at arms length.

Again, these two classes of persons—commission men and packing houses—comprise substantially *the entire field of the business of buying and selling*. The affidavits show that 80 or 90 per cent of the live stock received at the Kansas City market *is purchased by the packing houses*. If the packing houses decline to deal with a

commission man, *he is practically shut out of the market.* He may as well close up his office, for no matter how enticing the bargains are he may offer he is unable to make a sale.

Combinations which comprise substantially *the demand and the supply, the purchaser and the consumer, the buyer and seller,* and which undertake to *exclude from the market* all persons who are *nonmembers* are especially vicious in their conception and operation, and no court has yet been found to sustain a combination of that class. Especially is this true when, as in the case at bar, the combination undertakes to rule its members with *by-laws which are void by the statute as well as by common law.*

Such an association received the just condemnation of the law in *Judd* v. *Harrington* (34 N. E., 790), where an agreement was entered into somewhat similar to the one at bar. There an association was formed among sheep brokers "to protect their interests and prevent competition, each to pay the treasurer a certain sum for every head sold, and to receive an arbitrary proportion of the sum accumulated, made in furtherance of a contract with a similar and contemporaneously formed butchers' association, whereby the brokers were to slaughter no sheep, and sell only to members of the butchers' association, or forfeit so much per head sold to others, and the butchers were not to buy elsewhere under a like penalty."

In this case the parties to the agreement did not undertake, directly, to fix the price of the commodity. Their agreement was to restrict the purchases and sales to the members of their associations, and *to divide their commissions upon a certain basis.*

The court said:

> The *brokers were to sell only to the butchers* and the *butchers to buy only from the brokers.* The owners of sheep, or the drovers or consignees, who had them for sale, and the public who were interested in the price of meat as an article of food, *might have been prejudiced* by the agreement. *Whether they were in fact is not material.* The real purpose and intent of the agreement was to suppress competition in an article of food, and as such agreements tend to enhance the price, they are regarded *as detrimental to the public interest and forbidden by public policy.* That such agreements are illegal and void has been settled by the decisions of the courts from the earliest times. These authorities are to be found in the learned opinion below and upon the briefs of counsel in this court, but I do not consider it necessary to refer to them further or to discuss the question at length, for the reason that at this very term of the court the whole question has been examined, elaborately discussed, and decided in another case. (*People* v. *Sheldon*, 34 N. E., 785.)

Much emphasis is placed by counsel upon the apparent and ostensible purposes of this exchange "to promote honorable conduct," etc., among its members; but the court has only to look beyond the *apparent* purpose and to see that the *real purpose* is to prevent competition. As said by the Kansas court of appeals, in *Grace* v. *Payne* (46 Pac. Rep., 190), speaking of this very exchange, "It is impossible to read the articles of association and by-laws of this exchange *without being convinced of the fact that the principal inducement is not 'to promulgate and enforce among the members correct and high moral principles in the transaction of business,' as stated in the*

articles, but that it is rather to prevent competition along certain lines among those engaged in the live stock commission business, and to maintain uniform minimum prices for their services."

Courts have gone to the utmost limit in upholding associations of workingmen for the purpose of increasing their condition, securing better wages, etc., but even in this class of cases, where there is a contract or a combination between the *laborers as a class* and the *employers as a class*, which has for its purpose, direct or indirect, to *exclude from membership*, and so *from securing employment*, persons who are nonmembers, the courts have not hesitated to pronounce them *illegal*. This is well illustrated in the very recent case of *Curran* v. *Galen* (N. Y. Ct. of App., 46 N. E., 297), where the facts were as follows:

There was in Rochester, N. Y., a laboring organization known as "Brewery Workingmen's Local Assembly, Knights of Labor," composed of workingmen. There was also an association known as "The Ale Brewers' Association," constituting the persons engaged in operating breweries. The latter entered into an agreement with the Local Assembly, Knights of Labor, to the effect that all employees of the brewery companies belonging to the Ale Brewers' Association should be members of the Brewery Workingmen's Assembly, Knights of Labor, and that no employee should work for a longer period than four weeks without becoming a member. The plaintiff was retained in the employ of the Miller Brewing Company for more than four weeks after he was

notified that the provisions of said agreement required him to become a member of the Local Assembly, Knights of Labor. He was then requested to become a member, and upon his refusal to comply, certain members of the assembly, as a committee duly appointed for that purpose, notified the officers of the Miller Brewing Company of that fact, and the plaintiff was thereupon discharged, in accordance with the agreement. It was held that he was entitled to recover damages for the wrongful discharge.

The court said:

> If such an agreement is lawful, then it must be conceded that the defendants are entitled to set it up as a defense to the action, forasmuch as they allege what they did was in accordance with its terms. In the general consideration of the subject, it must be premised that the organization or the co-operation of workingmen is not against any public policy. Indeed, it must be regarded as having the sanction of law when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate. But the social principle which justifies such organizations is departed from when they are so extended in their operation *as either to intend or to accomplish injury to others.* Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be *to hamper or to restrict that freedom*, and through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, *then that purpose seems clearly unlawful, and militates*

against the spirit of our Government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy *which prohibits monopolies and exclusive privileges.* It would tend to deprive the public of the *services* of men in useful employments and capacities.

Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation under conditions equal as to all, and to enjoy the fruits of his labor without the imposition of any *conditions* not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a *compulsion* or a *fettering of the individual glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the State.* The sympathies of the fellow feeling which, as a social principle, underlies the association of workingmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed toward the *repression of individual freedom*, upon what principle shall it be justified?

The court here cites from *Reg.* v. *Rowlands* (17 Adol. & E.) (N. S.) 671) and continues:

> The *organization* of the local assembly in question by the workingmen in the breweries of the city of Rochester may have been *perfectly lawful* in its general purposes and methods, and may otherwise wield

power and influence usefully and justly, for all that appears. It is not for us to say, nor do we intend to intimate to the contrary; but so far as a purpose appears from the defense set up to the complaint, that *no employee of a brewing company shall be allowed to work for a longer period than four weeks without becoming a member of the Workingmen's Local Assembly*, and that a *contract* between the local assembly and the Ale Brewers' Association *shall be availed of to compel the discharge of the independent employee*, it is in effect *a threat to keep persons from working at the particular trade*, and to procure their dismissal from employment. While it may be true, as argued, that the contract was entered into on the part of the Ale Brewers' Association, with the object of avoiding disputes and conflicts with the workingmen's organization, that feature and such an intention can not aid the defense nor legalize a plan of *compelling workingmen not in affiliation with the organization to join it* at the peril of being *deprived of their employment* and of the means of making a livelihood. In our judgment the defense pleaded was insufficient in law upon the face thereof, and therefore the demurrer thereto was properly sustained. The judgment appealed from should be affirmed, with costs. All concur, except Haight, J., not sitting.

It is a universal rule that combinations, whether of workmen or tradesmen, become illegal when they exert any influence upon nonmembers *which amounts in law to intimidation or coercion*. It is not necessary that there should be *actual violence* or a threat of personal injury. It is sufficient if, by means of *moral coercion*, the nonmember is deprived of his constitutional right to carry on his business.

The mere refusal by an association, which controls the output of a commodity, to sell to dealers except on condition that such dealers handle no other goods than those manufactured by such corporation or association, is in itself *intimidation* or *coercion* within the rule.

In *People* v. *Duke* (44 N. Y. S., 336) it is said that "such intimidation of dealers as will render unlawful an attempt to secure their exclusive trade may be exercised by the refusal of a corporation controlling most of the cigarette output and whose goods are necessary to profitable business of dealers in cigarettes, *to sell to dealers except on condition that they handle no other cigarettes and maintain excessive prices.*"

In *State* v. *Stewart* (59 Vt., 273) it is held that "The labor and skill of the workman, the plant of the manufacturer, and the equipment of the farmer are in an equal sense property; every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; if two or more persons combine *to coerce his choice in this behalf*, it is a criminal conspiracy, whether the means employed are *actual violence* or a *species of intimidation that works upon the mind.*"

In *State* v. *Dyer* (67 Vt., 690) it is said that "a combination of two or more persons to constrain an employer to discharge a particular workman by threatening to prevent his obtaining other workmen, or to constrain a workman to join certain associations *by threatening to prevent him from obtaining employment unless he does so*, is a criminal conspiracy at common law."

In *State* v. *Donaldson* (32 N. J. Law, 151) it was held to be an indictable conspiracy for several employees

to combine and notify their employer that *unless he discharged certain enumerated persons they would in a body quit his employment.* The court said:

> There is this *coercion;* the men agreed to leave simultaneously in large numbers and by preconcerted action. We can not close our eyes to the fact that the threat of the workmen to quit the manufacturer under these circumstances *is equivalent to a threat* that unless he yield to their unjustifiable demand they would derange his business and thus cast a heavy loss upon him. The workmen who make this threat understand it in this sense and so does their employer.

In *Steamship Co.* v. *McKenna* (30 Fed., 48) the court said:

> All combinations and associations designed *to coerce workmen to become members,* or to *interfere with, obstruct or vex or annoy them in working or obtaining work because they are not members, or in order to induce them to become members,* * * * are illegal combinations or associations, and all acts done in furtherance of such intentions by such means and accompanied by damages, are actionable.

Displaying banners in front of a person's place of business, with inscriptions calculated to injure his business, and to deter workmen from entering into or continuing in his employment, is intimidation. (*Sherry* v. *Perkins,* 147 Mass., 212.)

In *Vegelahn* v. *Guntner* (44 N. E., 1077) it is said:

> Intimidation is not limited to *threats of violence,* or of personal injury to persons or property; *it has a broader signification; and there also may be a moral intimidation which is illegal. Patrolling or picketing,* under the circumstances stated in the report, are

elements of intimidation like those which are found in *Sherry* v. *Perkins* (147 Mass., 212).

In *The Master Stevedores' Association* v. *Walk* (2 Daly, 1) the court says (p. 13):

> Forming any association or combination for the purpose of *compelling journeymen or employers to conform to any rule, regulation, or agreement fixing the rate of wages*, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeymen below a certain rate, unless the journeyman pays the penalty fixed by the combination, or by threats or intimidation, violence or other unlawful means, is a conspiracy, for which the parties entering into it may be indicted.
>
> *State* v. *Glidden*, 55 Conn., 46.
> *Flood* v. *Jackson* (1895), 2 L. R., Q. B. D., 21.
> *Lyons* v. *Wilkins* (1896), 1 L. R., Ch. Div., 811.

It needs but a glance at the record to satisfy the court *that coercion and intimidation*, as herein defined, have been practiced by the defendants. In the first place, the *commission men* and the *packers* combine unlawfully, and in defiance of both statutory and common law establish rates of commission and make other regulations which are in restraint of trade. Not satisfied with this, by common consent they place an interpretation upon their by-laws by which it is agreed that *no commission man shall be permitted to do business at the Kansas City yards except he be a member of their illegal combination.* The practical construction placed upon a contract by the acts and conduct of the parties is controlling.

> *Merriam* v. *United States*, 107 U. S., 437.
> *Chicago* v. *Sheldon*, 9 Wall., 50.

Heinback v. *Stewart*, 11 Wall., 566.
Knox County v. *Bank*, 147 U. S., 91.
Topliff v. *Topliff*, 122 U. S., 121.
United States v. *Gibbons*, 109 U. S., 200.
Lowber v. *Bangs*, 2 Wall., 728.

If a person undertakes the commission business without first joining their organization, as in the case of Mr. Harris and in the case of Miss Goodwin, he is promptly notified to take out a membership or cease doing business. Appellants say in their brief (p. 33), speaking of Mr. Harris, that "on being requested to take out such membership he seems to have concurred in the propriety of the suggestion and acted accordingly." This same language might have been used with equal felicity had Mr. Harris been an inhabitant of some wild western town and had been requested to leave by the local vigilance committee. He probably would have "concurred in the propriety of the suggestion and acted accordingly" from the same motives of necessity.

It is the established fact, as amply shown by the affidavits, that *no person has ever been able to do business as a commission man at the Kansas City stock yards, in the face of the combined opposition of the exchange*, with the single exception of Greer, Mills & Co., who are temporarily protected by an order of court. It seems that when the *packing houses* and members of the exchange are protected against the enforcement of penalties by order of court, so that trading with nonmembers is not a crime against the by-laws, they are perfectly willing to do so. It is only *the coercion of the rules and its heavy penalties that prevent them from doing so at all times.*

The *coercion* exercised by the defendant exchange *in preventing nonmembers from doing business, for the purpose of compelling them to join the exchange*, or to cease doing business as nonmembers, is *in itself* illegal. In contemplation of law it is *malicious*, and the malicious attempt to injure the business of another is illegal even at common law.

Malice does not necessarily imply ill will. It may consist in a purpose to injure the business of another by compelling him to join an association.

The following is quoted from *Bowen* v. *Hall* (6 Q. B. D., 333) which is cited with approval in *Angle* v. *Ry. Co.* (151 U. S., 1, 14):

> If the persuasion be used for the *indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff*, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. (*Temperton* v. *Russell* (1893), 1 Q. B., 715.)

Lord Justice Lopes, in the last-mentioned case, said:

> The law appears to me to be that a combination by two or more persons *to induce others not to deal with a particular individual or enter into contracts with him, if it is done with an intent to injure that individual and if he is thereby injured, is an actionable wrong.*

Lord Justice Smith said:

> In my judgment it is perfectly clear law that to induce a person who has made a contract with another to break that contract *in order to hurt the person with whom it has been made, to hamper him in*

> *his trade or to put undue pressure upon him*, or to procure some indirect advan age for the person himself, *is, in point of law, to do it maliciously.*

Even persuasion and social pressure constitutes malice within the meaning of the rule. In *Vegelahn* v. *Guntner* (Mass.) 44 N. E., 1077) it was held that "the maintenance of a patrol of two men in front of plaintiff's business, in furtherance of a conspiracy to prevent, whether by force and intimidation or *by persuasion and social pressure*, any workmen from entering into or continuing in his employment, will be enjoined, *though such workmen are not under contract to work for plaintiff.*"

The court said:

> Intimidation is *not limited* to *threats of violence* or of *personal injury to person or property:* it has a broader signification, and there may also be a *moral intimidation* which is *illegal.* Patrolling or picketing under the circumstances stated in the report are *elements of intimidation* like those which were found to exist in *Sherry* v. *Perkins* (147 Mass., 212). * * *
>
> A combination among persons simply to regulate their own conduct is within an allowable competition and is lawful, although others may be indirectly affected thereby; but a combination to do injurious acts expressly directed to another by way of *intimidation or constraint, either of himself or persons employed or seeking to be employed by him*, is outside of allowable competition, and is unlawful.

In this case *Commonwealth* v. *Hunt* (4 Met., 111), *Bowen* v. *Matheson* (14 Allen, 499), *Steamship Co.* v. *McGregor* (1892) (App. Cas., 25), much relied upon by appellants, are quoted and relied upon in the *dissenting opinion.*

In *Barr* v. *Essex Trades Council* (53 N. J. Eq., 101) it is said that "malicious injury to a person's business is actionable. An injury to the business of another is malicious and actionable if done *intentionally and without legal excuse*."

Sir William Earle, in his work entitled The Law Relating to Trades Unions, says (p. 12):

> Every person has a right under the law, as between him and his fellow-subjects, to full *freedom in disposing of his own labor* or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom and is prohibited from any *obstruction* of the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another, in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, *but for the purpose of obstruction*, would, if damage should be caused thereby to the party obstructed, be a *violation* of this prohibition, and the violation of this prohibition by a single person is a wrong, to be remedied either by an action or indictment, as the case may be. It is equally wrong whether it be done by one or many, subject to this observation: That a combination of many to do wrong in a matter where the public has an interest is a substantive offense of conspiracy.

Judge Taft said (54 Fed. Rep., 730–738):

> Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice; that is, *with intention to injure another without lawful excuse*.

In *Bowen* v. *Hall* (6 Q. B. D., 330, 333), it is said:

> If the persuasion be used for the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff, it is *a malicious act*, which is in law and in fact a wrong act.

Malice in this connection does not necessarily imply hatred or a malicious motive. "When we speak in this connection of an act done with *a malicious motive*, it does not necessarily imply that the defendants were actuated in their proceedings *by spite or malice against the complainant*, Mr. Barr, in the sense that their motive was to injure him personally, but that they desired to *injure him in his business* in order to force *him not to do* what he had *a perfect right to do*. They only wished by *crippling his business* to *compel him to accede* to their views as to materials he should use in the make-up of his paper. They claim, in fact, that they had no intention to injure the business of the complainant, and that their only desire was for the protection of themselves."

Delz v. *Winfree*, 80 Tex., 400.
Olive v. *Van Patten*, 25 S. W., 428.

Malice is thus defined by Lopes, L. J., in *Flood* v. *Jackson* (2 Q. B. D. (1895), 21–40):

> I do not propose to attempt exhaustively to define malice, but I do say this, as being applicable to the present case, that *where a person willfully does an act to the injury of another without any lawful excuse, that is evidence of malice.*

It seems very clear that the by-laws of the defendants operate upon the business of would-be competitors in a manner which the law deems malicious. The willful intention, *without legal excuse*, to *deprive persons of their*

lawful right to engage in the business of commission merchants is in itself a conclusive evidence of such intent.

If further evidence were needed, it may be found in the incidents of the repeated, persistent, and continued efforts of the exchange to prevent Greer, Mills & Co., even after their withdrawal from the exchange, *from pursuing a lawful calling.* The facts in the case may be summed up in the apt language of the lower court:

> The testimony discloses *several instances* of parties attempting to enter the field and do business there without joining the exchange; and *in every instance*, unless protected by the courts, *they have been compelled to abandon the undertaking.* All parties now engaged in the business are members of the exchange except Greer, Mills & Co., who are making a fight in the courts to maintain their business and are temporarily protected by injunction. It appears from the testimony that any person or partnership *attempting to carry on business independent of the association is invited to apply for membership and if he fails to do so, or is rejected, and attempts to proceed, his name is written on a blackboard kept for public use in the exchange building, and all members are warned against dealing with him.* This admonition is strictly obeyed, and such person is *boycotted.* The outcome is *inevitable.* The *combined opposition* of three hundred men *against one* man can produce but one result. Almost every purchaser or vendor of live stock, *including the great packing houses*, does business through commission merchants, and *nearly the entire volume of live stock received at the yards is consigned to and controlled by these merchants, members of the exchange.* In vain does the outside dealer offer *attractive bargains* for the sale or purchase of stock. *They will have no intercourse with him.* This

state of affairs is known and *circulated among stock growers and shippers*, and they dare not ship their stock to *this boycotted broker or firm*. These facts are established and amplified by *a multitude of witnesses. The object and purpose of the exchange is written across it's face where all can read. It is to control and monopolize the entire business of buying and selling live stock at the Kansas City stock yards.*

But the courts say that a man's business is his property. He must be left free to adopt such calling, profession, or trade as may seem to him most conducive to the full enjoyment of the rights of life, liberty, and pursuit of happiness. The right to choose one's calling is an essential part of that liberty which it is the object of the Government to protect, and a calling when chosen is a man's property and right.

It is the right and privilege of any man to engage in the commission business at the Kansas City stock yards, or, having so engaged in that business, it is his right to continue. A combination whose efforts are directed to prevent him from transacting such business is one which the law will not tolerate.

Barr v. *Essex Trades Council*, 53 N. J. Eq., 101.
Slaughterhouse Cases, 16 Wall., 36–116.
Temperton v. *Russell* (1893) 1 Q. B., 715.

Temperton v. *Russell* (1893) (1 Q. B., 715) is a recent and instructive case. Plaintiff was a mason and builder, carrying on business at Hull. The defendants were members and officers of the Hull branch of certain associations of workmen, namely, The Operative Bricklayers' Society, The Bricklayers' Laborers' Society, and

The Operative Plasterers' Society. Plaintiff complained that the defendants maliciously and wrongfully, and with intent to injure him, procured and induced certain persons who had entered into contracts with the plaintiff to break such contracts, and that the defendants maliciously and wrongfully, and with intent to injure the plaintiff, *intimidated and coerced said persons to break their contracts with the plaintiff, and not to enter into new contracts with the plaintiff.*

The plaintiff was in the habit of supplying building materials to Myers & Temperton, who were master builders, carrying on business at Hull, and who conducted their business in a way that was not in accordance with the rules of the unions. Thereupon a joint committee of the unions passed the following resolution:

> That this committee advises the three societies to abstain from using any lime supplied by merchants who are supplying any builders that are working contrary to joint working rule No. 9. And further, that they refrain from handling or fixing any artificial stonework made by any man who is working contrary to rule 9.

On August 20, 1892, the plaintiff had entered into a contract with one Bretano, a builder, to supply him with certain building materials, viz, the concrete, heads, and sills for fifteen houses. On September 11 Bretano, in accordance with the summons, appeared before the joint committee of the unions, when he was informed by the defendant Russell that the committee would not allow the men belonging to the unions to fix goods supplied by

the plaintiff. On September 12 the committee passed the following resolution:

> That all members of the society refuse to use any material that may have been supplied by any builder who is not conforming to rule 9, and that any member using or handling any material, either lime, bricks, or artificial stone, will be dealt with by the society in accordance with rule 9.

Bretano thereupon refused to perform his contract with the plaintiff. Evidence was also given in regard to similar cases in which the plaintiff had entered into contracts with other persons for the supply of building materials.

Lord Esher, M. R., referred to the action of the defendants in notifying Bretano to discontinue his contract with plaintiff, saying:

> Russell handed the resolution to Bretano and let him know that if he went on dealing with the plaintiff *harm would come to him in his business, because no workman who was a member of the union would touch the material supplied by the plaintiff.*
>
> The object of this was *not to hurt Bretano*, but to *injure the plaintiff in his business*, so as to *force him* to *comply with the union rules*. It is argued that this did not amount to an order to workmen, but was only a piece of advice, a notice, and that they might do as they liked. This is not true. It was an order, an order which the workmen were bound by their undertaking to obey; and they knew that *if they did not obey they would be expelled from the union*. It was an order to those workmen that if Bretano took any goods from the plaintiff *they were to cease working for Bretano*. The intention was *to injure the plaintiff in his business, and so force him to obey the unions.*

The court thereupon reaffirmed its ruling in *Bowen* v. *Hall* (6 Q. B. D., 333), saying:

> We tried to state the rule of law, and we said that though merely to persuade a man to break his contract may not be wrongful in law or in fact, yet "if the persuasion be used *for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it.*" We think that it can not be doubted that *a malicious act, such as is above described*, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley* v. *Gye* (2 E. N. B., 216), and which is complained of in the present case, is, therefore, because malicious, wrongful. That act is the *persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff.* It can not be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion it is the actual consequence. That proposition is quite applicable to this case, where people have been forced, not by obligations, but by means of the conditions under which they carried on their business, to break their contracts.
>
> Is there, as has been argued on behalf of the defendants, a difference between the case of forcing a person to *break an existing contract* and the case of *forcing a person not to enter into a contract?* I can see no difference. Practically it comes to this: You have a contract with A. B., and to-morrow you are going to enter into another contract with him; if you carry out the one *I will destroy your business*,

and if you enter into the other *I will do the same.* In each case there is the same wrongful intent and the same effect of doing injury. I am of opinion that in this case there was evidence on which the jury might find that people were prevented from *making contracts* with the plaintiff by *pressure brought by the defendants*, and that the plaintiff's business had fallen off, and the natural inference for the jury to draw was that the pressure was the cause of the falling off of the plaintiff's business.

Lord Justice Lopes said:

The second question in the case is as to *inducing persons not to enter into new contracts with the plaintiff.* The jury were asked whether the defendants maliciously conspired to induce persons not to enter into contracts with the plaintiff, and whether such persons were thereby induced not to enter into such contracts, and they answered in the affirmative. Does that answer amount to a finding of an actionable wrong? I think that it does. The law appears to me to be that *a combination by two or more persons to induce others not to deal with a particular individual or enter into contracts with him, if it is done with an intent to injure that individual, and if he is thereby injured, is an actionable wrong.*

Lord Justice Smith said:

In my judgment it is perfectly clear law that to induce a person who has made a contract with another to break that contract, *in order to hurt the person with whom it has been made, to hamper him in his trade, or to put undue pressure upon him, or to procure some indirect advantage for the person himself*—to induce another to break a contract for any of these motives—is, in point of law, to do it *maliciously.* * * * In my judgment there is some

evidence in this case, first, that the defendants intended to *coerce* the builders, Myers & Temperton, *to obey their edicts*, and to bring this about they determined to cut off from them the supply of all materials they might require for their trade, and also the supply of men; second, that inasmuch as the plaintiff would not fall in with their commands, the defendants then determined *to cripple and injure him in his trade* by inducing Bretano (together with others who were under contract with the plaintiff) to break the contract which they well knew he had with the plaintiff, so that by this means he might be coerced into obedience.

In my judgment, not only was there good evidence against defendants upon this case of Bretano, but I go further and say that if the jury had found for the defendants upon this they would have been wrong. * * *

As regards the second cause of action, i. e., the count for conspiracy, I agree with what has been said by the other members of the court.

That the coercion or intimidation of persons under contract, or, in other words, *the prevention of the making of contracts*, is equally conspiracy, is further shown in *Vegelahn* v. *Guntner* (44 N. E. Rep., 1077), where the court said:

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who *are not bound by contract to remain with him*, or with persons who are not under any existing contract, but who are wanting or intending to enter into his employment. A conspiracy to interfere with plaintiff's business by means of threats and intimidations by maintaining a patrol in front of his place in order to prevent

persons from *entering his employment* or in order to prevent persons who are in his employment from continuing, is unlawful, *even though such persons are not under contract to enter into or continue in his employment;* an injunction should not be so limited as to relate only to persons who are bound by existing contracts.

A similar case is *Flood* v. *Jackson* (2 Q. B. D. (1895), 21). There the plaintiffs were shipwrights employed by the day by a firm of ship repairers to execute repairs to the woodwork of a ship. Some iron workers, who were members of a trade union, were employed on the ironwork of the ship, and they objected to working in the same yards with the plaintiffs, upon the ground that the latter had previously worked at ironwork on ships in another yard. The district delegate of the union was called in by the iron workers, and he informed the employers that *the iron workers would leave off work unless the plaintiffs were discharged that day.* In *consequence of that threat* the plaintiffs were *discharged* at the end of the day. The plaintiffs brought an action against the district delegate, the chairman, and general secretary of the union, for maliciously and with intent to injure plaintiffs *inducing the employers to discharge the plaintiffs and to refuse to engage them again.* The jury found that the district delegate had acted maliciously, and that the plaintiffs had been injured thereby, but that the other two defendants did not authorize his acts.

It was held that the action was maintainable against the district delegate, although the discharge of the plaintiffs and the refusal to reengage them involved no breach of contract on the part of the employers.

Lord Esher, M. R., said:

> Now, it is clear that merely to persuade a person who has contracted to break his contract gives no cause of action at all; but if it is done *maliciously*, for the *purpose* of *injuring the person* to whom the advice is given, or for the purpose of injuring someone else, the person against whom the malice is directed and carried out has *a cause of action*, not on the ground of the persuation to break the contract, but on the ground of the malice directed against him. To my mind, the result is the same, *whether the persuasion is to break a contract or not to make a contract*. One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice; but if the first person *uses that persuasion with intent to injure the other or to injure the person with whom he is going to make a contract*, then the act is *malicious*, and the malice makes that unlawful which would otherwise be lawful.

Lord Justice Lopes said (p. 40):

> It seems to me, therefore, clear that he (the defendant) went for the purpose of *injuring the plaintiffs*, and that he did injure them, because they were discharged. Was there any lawful excuse, any lawful cause for his so acting? To my mind, none whatever. He might, if he thought fit, have withdrawn the iron workers, or the iron workers might have withdrawn of their own accord from the work. *But what right had he to go to the employers and induce them to discharge the plaintiffs?* It seems to me that if my proposition given above is correct, this case is well brought within it, and there is abundant evidence upon which the jury might find as they did.

In *Lyons* v. *Wilkins* (1 Ch. Div. (1896), 811) the defendants, officers of a trade union, ordered a strike against the plaintiff manufacturers and also against S., a person who made goods for the plaintiffs only; and their pickets, by their direction, watched and visited the works of the plaintiffs and of S., for the purpose of persuading the workmen to abstain from working for the plaintiffs.

It was held that this kind of picketing and the strike against S., for the indirect purpose of injuring the plaintiffs, were illegal acts, and an injunction was granted to restrain the defendants and their agents from watching or visiting the plaintiff's works for the purpose of persuading persons from working for him, and also to restrain the defendants from preventing S. or any other persons from working for the plaintiffs by withdrawing his or other workmen from their employment.

Lord Justice Lindley said (p. 822):

> The consequence of these proceedings is, that the trade unions are, in effect, preventing Messrs. Lyons *from carrying on their business upon such terms as they may choose to arrange with people who come to an agreement with them.* * * * Now, Parliament has not yet conferred upon trades unions the power to *coerce people and to prevent them from working for whomsoever they like upon any terms that they like*; and yet, in the absence of such power, it is obvious that a strike may not be effective and may not answer its purpose. Some strikes are perfectly effective by virtue of the mere strike, and other strikes are not effective unless the next step can be taken and unless other people can be *prevented* from taking the places of the strikers. That is the pinch of the case in trade disputes, and until Parliament confers upon

trades unions the power of saying to the people: "*You shall not work for those who are desirous of employing you upon such terms as you and they may mutually agree upon*," trades unions exceed their power when they try to compel people not to work except upon the terms fixed by the unions. I hardly need say that up to the present moment *no such power as that exists.* * * * Trades unions have now been recognized up to a certain point as organs for good. They are the only means by which workmen can protect themselves from the tyranny on the part of those who employ them; but the moment that trades unions *become tyrants in their turn* they are *engines of evil. They have no right to prevent any man from working upon such terms as he chooses.*

Conceding to the commission man the right to form an exchange, or even a labor union; conceding that they have the right to agree not to trade with nonmembers, how can it be said that they have acquired *the power of preventing nonmembers from doing business.*' When the commission men succeed in *persuading the packing houses not to deal with nonmembers* they go beyond the limit of lawful action, as indicated in the foregoing cases.

If the commission men *alone* constituted the exchange (and the by-laws contemplate that the membership shall include only commission men), and if they had gone to the packing houses and induced them to refrain from dealing with Greer, Mills & Co., with Mr. Harris, or Miss Goodwin, or any of the other unfortunates there, either in completing existing contracts or in making contracts for the future, *can there be any question that the association would then be transcending lawful limits.*'

IX.

THE DEFENDANTS HAVE MONOPOLIZED AND ATTEMPTED TO MONOPOLIZE, AND COMBINED AND CONSPIRED TO MONOPOLIZE, PART OF THE TRADE OR COMMERCE AMONG THE SEVERAL STATES.

In discussing the question of monopoly it is important to recur to the facts as disclosed by the affidavits. It appears that the territory dependent upon the Kansas City market is vast in extent, and that the market, next to Chicago, is the largest in the world. The value of the property of the Kansas City Stock Yards Company, used for stock yards purposes, has recently been judicially investigated (82 Fed. Rep., 850-855) and determined to be between $5,000,000 and $6,000,000. The handling of live stock is obviously very different from other branches of trade and commerce, and requires conditions and surroundings peculiar to itself. Various classes of merchandise may be marketed and sold in many places in the large cities, but the marketing of live stock must necessarily, by its very nature, be confined to particular localities. The marketing of live stock grown in the West must necessarily be done at one of the great stock markets, where stock yards and appropriate appliances are provided. In the nature of things there is little or no competition.

It appears from appellants' brief that exchanges have been organized at all of the stock markets, *with by-laws which fix minimum commissions.* All live stock in the

vast territory tributary to the Kansas City yards must of necessity be marketed there, and in the nature of things it is not possible or practicable that there should be two or more yards which might compete with each other.

The defendants have so combined that this vast traffic is entirely within their control. No live stock can be sold (except theoretically) unless by the aid of and through some commission man. No commission man can make sales unless he is a member of this exchange and abides by its unlawful schedule of commissions. The object of the exchange, says Judge Foster, "*is to control and monopolize the entire business of buying and selling live stock at the Kansas City stock yards.*"

Or, as said in *Greer* v. *Payne* (46 Pac. Rep., 190), it is "*powerful enough to monopolize such services*" as commission men.

A monopoly is thus defined in *Charles River Bridge* v. *Warren Bridge* (11 Peters, 607):

> But what is a monopoly, as understood in law? It is an exclusive right granted to a few of something which was before of common right.

It is not necessary that complete control of the market should be acquired in order to constitute a violation of the act of July 2, 1890. "*All the authorities agree that in order to vitiate a contract or combination it is not essential that its results should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.*" *United States* v. *E. C. Knight Co.* (156 U. S., 1, 16.)

Mr. Justice Field, in his concurring opinion in *Union Co.* v. *Crescent Co.* (111 U. S., 746), cited by appellants, says (p. 757):

> The common business and callings of life, the ordinary trades and pursuits which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is the distinguishing privilege of citizens of the United States and the essential element of that freedom which they claim as their birthright. * * *
>
> In this country it has seldom been held, and never in so odious a form as is here claimed, *that an entire trade or business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty.* That exists only where every individual has the power to pursue his own happiness according to his own views, unrestrained except by equal, just, and impartial laws. * * * It can not be said that a State may limit to a specified number of its people the right to practice law, the right to practice medicine, the right to preach the gospel, the right to teach, or sell, or to pursue particular business or trades, and thus parcel out to different parties the various vocations and callings of life.

If the State of Kansas or the State of Missouri had undertaken to parcel out to the defendant commission men *the exclusive control of their particular vocation*, and had given them the exclusive right to pursue that particular vocation, *how long would such an act stand in a*

court of justice? The statement of the proposition is its own refutation. And yet these defendants claim that they are entitled to the *exclusive right* of doing a commission business at the Kansas City stock yards, and that they have the power to *prevent any other person or corporation from engaging in that business or interfering with them in any respect.* In the case last above referred to Mr. Justice Bradley (with whom concurred Mr. Justice Harlan and Mr. Justice Woods) said (p. 760):

> I hold it to be an incontrovertible proposition of both English and American law *that all mere monopolies are odious and against common right.*

After referring to the case of monopolies (11 Reports, 84 *b.*) and the act of 1821, James I, abolishing monopolies, Mr. Justice Bradley continues:

> They form one of the constitutional landmarks of British liberty, like the Petition of Right, the Habeas Corpus Act, and other great constitutional acts of Parliament. They establish and declare one of the inalienable rights of freemen which our ancestors brought with them to this country. The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition "All men are created equal," and "that they are endowed by their Creator with certain inalienable rights," and "that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, *by investing the latter with a monopoly,* is to invade one of the fundamental privileges of the

citizen, contrary not only to common right, but, as I think, to the express words of the Constitution. It is what no legislature has a right to do, and no contract to that end can be binding on subsequent legislatures. * * *

Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock markets and produce market, and in many other ways. If by legislative enactment they can be carried into the common vocations and callings of life so as to cut off the right of the citizen to choose his vocation, the right to earn his bread by the trade which he has learned; and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution was still further amended. In my judgment the present Constitution is amply sufficient for the protection of the people if it is fairly interpreted and faithfully enforced.

All agreements which tend to deprive the public of the *services* of parties in the employments and capacities in which they are most useful, are illegal, since they tend to expose the public to the evils of monopoly. (*More* v. *Bennett*, 29 N. E., 88.)

The attempt of a corporation engaged in the refining of sugar to draw to itself the other sugar refineries is held to be a monopoly in *United States* v. *E. C. Knight Co.* (156 U. S., 13). It is said in *United States* v. *Addyston Pipe and Steel Co.* (78 Fed. Rep., 712–723), in speaking of the Knight case:

> The sugar trust was confessedly a monopoly in the common-law sense and in a commodity of prime necessity.

In *Minnesota* v. *Illinois* (94 U. S., 113) there were fourteen warehouses in the city of Chicago which from year to year agreed upon the rates, and through which grain from the Western States had to pass on its journey to the seaboard. The court said (p. 131):

> Thus it is apparent that all the elevating facilities through which these *vast productions of seven or eight great States of the West must pass*, on the way to four of five of the States on the seashore, *may be a virtual monopoly.* * * * This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present immense proportions something had occurred which led the whole body of the people to suppose that remedies, such as are usually employed to prevent business abuses by virtue of *monopolies*, might not be inappropriate here.

If an arrangement among the proprietors of fourteen grain elevators, through which grain passes on its way east, is regarded by the court as a monopoly, may it not be said that it is equally a monopoly where the entire business of handling the vast live-stock traffic that passes to or through Kansas City *is handled by a single body of commission men, with fixed rates of commissions, and who have arrogated to themselves the right to do all of this class of business to the exclusion of every other person.*

It appears from the record (p. 78) that since the organization of the exchange in 1886 there has been received over 1,000,000 cars of stock. At an average rate of $10 per car *the amount paid for commissions exceeds the sum of $10,000,000!*

If the commissions, under the rules, are double what they were before its organization, as the proof shows, and as the lower court found, *it results that the stock raisers have paid unlawful toll and tribute to the exchange in the sum of $5,000,000!*

If the members of the exchange are required to do business on a competitive basis, as other business men do, it means a saving of over $5,000,000 to the stock growers and raisers in the next decade!

The discussion under a former heading of the legality of defendants' organization has necessarily involved a consideration of this feature of the case, so that further discussion seems unnecessary.

X.

EXCHANGES IN GENERAL.

Appellants' counsel have undertaken to prepare a most elaborate article on the various exchanges in existence throughout the world, and profess to have examined and set forth the rules of these various institutions.

We are unable to perceive in what way this discussion pertains to the consideration of the question involved in this case. We might with equal plausibility have written a history of "bucket shops," and it would have been equally relevant. That an exchange properly conducted on legal lines, and in conformity rather than in violation of law, may be beneficial to the community where it exists, as well as to the country at large, may be conceded. The formation of exchanges in the large cities may be admitted to have benefited trade and commerce. The

question here to be considered is the legality or the illegality of the Kansas City Live Stock Exchange.

We are not advised how it is that the court may consider the rules and by-laws of the various exchanges mentioned in appellants' brief, even if it were conceded that they were a pertinent subject of inquiry. They were not pleaded in the court below, much less put in evidence. They are matters of which the court will not take judicial notice, and very properly so, since the legality of the rules of an exchange depends upon many facts and circumstances, and would only be legitimately determined in the light of their operation.

It was said by Mr. Justice Brewer in *Sacchass* v. *Armstrong* (16 Kas., 192), "The general organization of the Methodist Episcopal Church, its administration, and control over the local churches of that denomination, *can not be considered by us, for the facts concerning the same are not in the case made, and they are not matters of which the court can take judicial notice.*"

Speaking of the rules of the board of brokers of San Francisco, the court said (*Goldsmith* v. *Sawyer*, 49 Cal., 209, 212): "The court, however, will not take judicial cognizance of those rules *unless they are those rules and usages of trade and commerce which would be recognized without their adoption by any particular board or association, and the party who relies upon them must plead them.*"

The courts will not take judicial notice of private incorporation acts (*Danville Plank Road Co.* v. *State*, 16 Ind., 456; *Perry* v. *Railroad Co.*, 55 Ala., 413; *Maudere* v. *Bonsignore*, 28 La., 415), nor of the existence of

ferries established by county commissioners (*State* v. *Wise*, 7 Ind.); rules, usages, and customs of mining districts (*Sullivan* v. *Hense*, 2 Colo., 429); local customs concerning rights of way (*Lewis* v. *McClure*, 8 Oreg., 273); by-laws of a corporation (*Benevolent Society* v. *Phillips*, 36 Mich., 22); rates of exchange between different parts of the country (*Lowe* v. *Bliss*, 76 Am. Decisions, 742); local customs and history (*Turner* v. *Fish*, 28 Miss., 306, 311); rules of religious denominations (*Young* v. *Ransom*, 31 Barber, 49). The local history of a county will not be considered on appeal unless proved before the jury. (*McKinnon* v. *Bliss*, 21 N. Y., 206, 214.)

In speaking of the court's power to notice things judicially this court said, in *Brown* v. *Piper* (91 U. S., 37): "This power is to be exercised by the courts with caution. Care must be taken that the requisite notoriety exists. *Every reasonable doubt upon the subject should be resolved promptly in the negative.*

> *Steamship Co.* v. *Ins. Co.*, 129 U. S., 397, 444, 464.
> *Engraving Co.* v. *Hoke*, 30 Fed. Rep., 444.

The local rules and regulations of miners, although recognized by the statute, will not be noticed judicially unless they are produced and admitted in evidence.

> *Meydenbauer* v. *Stevens*, 79 Fed. Rep., 787, 791.
> Phillips on Evidence, vol. 1, p. 625 (4th Am. Ed.).

But if the private rules and by-laws of the various exchanges throughout this country and Europe are to be noticed judicially, the fact remains that *they are beneficial or injurious, legal or illegal, depending upon the character of the particular organization and the method by*

which it is managed and operated. Properly organized and operated, they are beneficial to commerce and to the community. They may be, however, and frequently are, injurious to the best interests of the country, and this is well known to the text writers on political economy and economics as well as to courts.

In his work on economics (chap. 4), Mr. Arthur T. Hadley, professor of political economy in Yale University, an eminent author and one who needs no introduction to this court, says, in speaking of the speculative tendency at the present day:

> The sales of certain staples, such as wheat, cotton, or petroleum, in the New York markets are, in some years, *fifty times as great as the actual deliveries.* Of the transactions in stocks perhaps *an equally small proportion represents purchases for investments.* A large part of such sales and purchases are made *on margins*, the buyer not paying or intending to pay the full amount. * * * The narrower the margin, the greater is the chance of gain or loss in proportion to the capital invested, and the higher are the stakes to the *gambler* on either side.
>
> Here as elsewhere high stakes constitute a temptation to unfair play. If the outside public, as frequently happens, has bought securities in the ill-grounded hope of a rise in price, the professional operators will speculate for a fall, and try to insure its advent by spreading false reports of every kind. If, on the other hand, a large number of operators have made contracts to deliver securities or produce which they do not possess, a few men with large capital will often try to lock up the whole supply of such commodities and compel those who have made

> the contracts to purchase the means of filling them at an exorbitant figure. Such an operation is known as a "corner," and its success is made possible by the number of speculative contracts which must be filled within a limited period of time. The man who thus attempts to manipulate the markets, lowering prices by false reports or raising them by fictitious scarcity, is doing the same kind of business as the man who "pulls" horses or "stacks cards." In fact, he is doing worse; for the men who suffer from false running or card sharping are those who voluntarily go into the business of betting, while the knavish speculator may hurt, to some degree, not only other speculators, but also the producers and consumers. * * * The direct harm done to producers and consumers is very likely much less than is generally supposed; * * * but the indirect harm to business methods and business morals is incalculable. * * * If business men can not be controlled by commercial ethics—ethics fitting the conditions of to-day rather than those of five centuries ago—*they must expect to be controlled by something else.* * * * If they will not accept the full measure of their responsibility which goes with their industrial power, they must expect to be *deprived of responsibility and power together by a popular movement in the direction of socialism.* Such a movement is being aided and countenanced by every financier whose interests in the stock market lead him to forget the interests of his properties, by every lawyer who teaches his clients to evade the responsibilities of wealth.

This court recognized the evils which grew up and manifested themselves in the stock markets and produce markets in *Butchers' Union Co.* v. *Crescent City Co.* (111

U. S., 746), where Mr. Justice Bradley, with whom concurred Mr. Justice Harlan and Mr. Justice Woods, said:

> Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the *stock market* and *produce market*, and in many other ways.

This court, in *Armstrong* v. *Bank* (103 U. S., 433), had occasion to consider and vigorously condemn an attempted "corner" in wheat, manipulated on the Chicago Board of Trade, which played an important part in the wrecking of the Fidelity Bank.

Professor Jevons, in his Theory of Political Economy, page 92, in speaking of the ideal exchange, in which it is to be observed illegal features are conspicuously absent, says:

> The theoretical conception of a perfect market is more or less carried out in practice. It is the work of brokers in any extensive market to organize exchanges, so that every purchase shall be made with the most thorough acquaintance with the conditions of trade. Each broker is in communication with as many other traders as possible in order to have the widest range of information and the greatest chance of making considerable exchanges. It is only thus that a definite market price can be ascertained at every moment. * * * By the mediation of a body of brokers, a complete consensus is established, and the stock of every seller or demand of every buyer brought into the market.

In an interesting article in Harper's Magazine, vol. 71, p. 829, Mr. R. Wheatley describes the workings of

the New York Stock Exchange, giving also a sketch of its origin and purposes. The writer says:

> The ideal business of the New York Stock Exchange is unquestionably as legitimate as that of the Produce Exchange or any intermediary between the seller and the buyer. *That there are grave evils incident to its operation is equally unquestionable.* * * * *While the Stock Exchange has legitimate and invaluable uses, it is none the less true that it has been converted into a gambling arena by the great speculative operatives.* * * *

Again the writer says:

> Failures in business are not so common with brokers as with their clients. One of the more prominent is credited with the assertion that "*If there were no fools most of the members of the Stock Exchange would have to retire from business.*" * * *
>
> For the year ending December 31, 1881, the transactions of the Stock Exchange are computed to have amounted to $12,816,246,600. Checks for this enormous amount were drawn and paid. The commissions thereon at one-fourth of 1 per cent would be $32,040,616, which divided equally among the eleven hundred brokers would give each the snug little sum of $29,127. This as related to the cost of a seat is almost if not quite equal to the Israelite's "shent per shent." * * * It is impossible without possession of an abstract of each broker's business to accurately estimate the amount of *fictitious sales on margins as compared to sales to bona fide investors. It can not be judged to be less, and is probably more than one-half of the whole.*

In the Fortnightly Review, vol. 40, p. 758, in an article on finance, it is said, speaking of the tendencies of the Stock Exchange to induce gambling and conse-

quent defalcation, "*To men cursed with the passion for gambling, the Stock Exchange affords facilities that Homburg or Monaco never approached.*"

Our only purpose in going into this branch of the case is to demonstrate that there is no magic in the name "exchange" which exempts members from the results of a violation of the law. Illegal transactions are as promptly condemned when incorporated into the purpose of an exchange as elsewhere.

In the very recent case decided by the House of Lords, *The Universal Stock Exchange Limited* v. *David Strachan* ((1896) App. Cas., 166), the court had occasion to condemn in unmeasured terms a stock exchange which, although skillfully organized, and although in its articles gaming and wagering were expressly prohibited, was nevertheless held to be illegal.

Lord Halsbury, L. C., said that, notwithstanding the ostensible purpose of the exchange, "the whole transaction has to be looked after, and the whole nature of this institution, whatever it is. *Speaking now upon the evidence before us, it appears to me as if it were a concern expressly designed for the purpose of enabling people to gamble in such a way as to evade the provisions of the law.* * * * *When I look at the terms themselves, the whole scheme appears to me to be intended with great ingenuity to pretend that there is a real transaction, and yet there is to be a payment in respect of relations between the parties, which is only reconcilable in my mind with its being an unreal transaction.*"

Lord Herschell said, "I think the character of the documents themselves, coupled with the nature of the transactions entered into, the position of the parties who

entered into them, and other circumstances I need not detail, *raise a question for the jury whether these were real transactions of commerce, or whether they were a mere gambling for the differences.*"

In *McGrew* v. *City Produce Exchange* (85 Tenn., 572), the court said:

> The bill alleged and the proof showed that these defendants combined and federated together, styling themselves, when chartered, as "The City Produce Exchange," for the purpose of engaging in the business of buying and selling futures in corn, cotton, wheat, etc., ostensibly, while *in reality it was a pretense;* the real business intended to be done and in fact done being the *pretended purchase or sale for future delivery of these products under contracts in legal and valid form when in fact illegal and invalid because of the nonexistence of any real intention to buy and sell for such delivery; and so executed and framed to cover and conceal the real purpose of the parties, which was to gamble and wager on the rise and fall of prices of articles pretended to be bought or sold.* * * * *The facts justify the finding that the incorporation was but a cloak used to cover the illegal acts contemplated in the organization and done as a business.*

Beadles v. *McElrath* (3 S. W., 152) was a case in which certain transactions on the New Orleans Cotton Exchange are declared wagering contracts in spite of the rule of the exchange that actual delivery of the cotton might be exacted. The court said:

> The testimony of appellants leave us in doubt on this subject, and neither the rules of the Cotton Exchange nor the letter of the contract will be allowed to give validity to such agreements. We

are aware that the business of the Cotton Exchange *involves the greater part of the trade of the country's greatest staple, and that leading merchants and business men engage in such transactions; but this in no manner relieves the case from the vicious features of this class of contracts. They are nevertheless pirates upon the legitimate trade and consumers of the country.*

A great number and variety of transactions on exchanges have been held to be illegal by courts, a few only of which will be mentioned.

Merchants' Exchange of St. Louis.

Crawford v. *Spencer*, 92 Mo., 499.
Connor v. *Black*, 119 Mo., 126.

Milk Exchange.

People v. *Milk Exchange*, 27 L. R. A., 437.

The Lockport Coal Exchange.

People v. *Sheldon*, 23 L. R. A., 221.

The Nashville Coal Exchange.

United States v. *Jellico Coal Co.*, 12 L. R. A., 753.

New York Stock Exchange.

Pratt v. *Boody*, 35 A., 1113.

City Produce Exchange.

McGrew v. *City Produce Ex.*, 4 S. W., 38.

Chicago Board of Trade.

Melchert v. *Am. Tel. Co.*, 11 Fed., 193.
Beveridge v. *Hewitt*, 8 Ill. Ap., 467.
Watt v. *Costello*, 40 Ill. Ap., 307.
Pierce v. *Foote*, 113 Ill., 228.
Cothran v. *Ellis*, 125 Ill., 496.
Stock Exchange v. *Mellen*, 27 Ill. Ap., 556.
McCormick v. *Nichols*, 19 Ill. Ap., 334.

Lyon v. *Culbertson*, 83 Ill., 33.
Warren v. *Scanlon*, 59 Ill. Ap., 138.

San Francisco Stock and Exchange Board of Brokers.

Cushman v. *Root*, 89 Cal., 273.

Cotton Exchange of New Orleans.

Beadles v. *McElrath*, 3 S. W., 152.

New York Cotton Exchange.

Fortenbury v. *State*, 47 Ark., 188.

Corn Exchange.

Gregory v. *Wendell*, 40 Mich., 432.

Milwaukee Chamber of Commerce.

Barnard v. *Backhouse*, 52 Wis., 593.

Kansas City Live Stock Exchange.

Greer v. *Payne*, 4 Ks. Ap., 153.
United States v. *Hopkins*, 82 Fed., 533.

Chicago Live Stock Exchange.

People v. *Chicago Live Stock Exchange*, 48 N. E., 1062.

Corn and Flour Exchange, Baltimore.

Irwin v. *Williar*, 110 U. S., 499.

Without in any way attempting to belittle the advantages of an exchange lawfully organized and lawfully conducted, we submit that there are evils connected with it which in a proper case courts will not hesitate to correct. The remarks of the lower court in this respect were perfectly justified by the existing conditions. The court said (82 Fed. Rep., 536):

> I may be permitted to say, however, that the methods and aims of many of these exchanges

and boards of trade are *not altogether beneficial* to the business and commerce of the country. That they are beneficial to the *members* and perhaps to the *locality* may be admitted. It may also be admitted that a properly conducted agency or medium through which the vendor and vendee may readily sell and buy everything that enters into commerce or trade is demanded by the business interests of the whole country; but this agency should not be permitted to tamper with or in any way *impede or restrain the natural flow of the stream of industry or commerce*. The crying complaint to-day, and the *great menace* to the welfare of the people, is *the tendency of wealth to monopolize and control by trusts and combinations the products and industries of the country;* and it must be confessed by every thoughtful observer that the many so-called stock and produce exchanges *are among the most potent instruments for the accomplishment of these purposes by speculators and adventurers, men who, adding nothing to the productive wealth of the country, grow rich or poor by gambling on the wealth produced by others.* Men are daily selling to these exchanges millions of bushels of corn, wheat, and other produce, who neither have nor expect to have a bushel, and others are buying millions of bushels who never expect to receive a bushel. Both sides are tampering with the *normal prices fixed by the law of supply and demand*, and attempting by dishonest means and methods to serve their ends. The courts have uniformly condemned this class of business as illegal, and though it is under the ban of the law, it still flourishes. The remedy must be looked for in legislation and not in the courts alone.

XI.

APPELLANTS' AUTHORITIES ON THE SUBJECT OF EXCHANGES.

With commendable industry the appellants have collected a vast number of cases relating to exchanges of various kinds. As above stated, we are unable to perceive the relevancy of this inquiry in determining the question of the illegality of the exchange in question, which is to be tested by the act of July 2, 1890.

Much time and space are devoted to a discussion of the London Stock Exchange (in which gambling and wagering contracts are prohibited), but inasmuch as the rate of commissions is regulated by statute (Bisbee & Simonds, Law of Produce Exchange, sec. 105; Dos Passos on Stock Brokers and Stock Exchanges, p. 245), we are somewhat at a loss to perceive how any light is thrown on the subject under discussion.

Attention is also called to the Paris Bourse, which is said to have been organized in 1324, having its membership limited to sixty; but as the act of July 2, 1890, is not operative in France, and as it, according to Dos Passos, page 327, is maintained under the supervision of the Government, and the members are Government officers, the analogy between it and the case under consideration is not apparent.

At the beginning of the discussion, page 89 of their brief, appellants' counsel "propose to show that provisions fixing minimum commissions, etc., have been conspicuous features of every trading exchange in the world." They also declare "that these exchanges all bear the same

characteristics which are here denounced as evidencing a purpose to restrain trade, and to monopolize a given branch of trade."

It is a significant fact, however, that no features "which are here denounced as evidencing a purpose to restrain trade and to monopolize a given branch of trade" have been the subject of consideration in any of the numerous cases cited. No case cited holds that an association, whether organized as an exchange or not, has the power to limit the right of members *in transmission of interstate telegraph messages*. No case cited holds that an association has the right *to limit its members in respect to the number of solicitors that may be employed in soliciting shipments*. No case cited holds that members of an exchange or other association *may agree upon an artificial schedule of commissions in connection with rules which exclude from the market nonmembers*, when they desire to compete in the market with them. No case is cited which holds that two classes of persons, naturally antagonistic, for example, the buyer and seller, or purchaser and consumer, *may combine to control the entire business of a commodity at any great market*.

We desire to briefly review the authorities relied upon by the appellants, with a view of aiding the court in determining the exact questions passed upon. In appellants' brief, in many instances, *fragments of quotations are torn from the text and grafted on the statements of counsel so as to apparently make a strong and forcible statement of the law in support of their position; but we think, with all due respect, that such statements are in many instances misleading*. Thus, from the statement made (p. 90) in

reference to *McQuillon* v. *Real Estate Exchange* (15 N. Y. Supplement, 206–207), it might be inferred that it had been judicially determined that *such rules as are here in controversy* "were not only reasonable but essential to the preservation of the exchange and the protection of its members;" but, in fact, the only question decided in that case was that a "stand" in the auction room of the Real Estate Exchange and Auction Room, Limited, of New York, *is not assignable;* that it can not be sold or assigned by a member of the exchange who had sold his stock even to another member; that it is a *personal right of a strictly personal character.* The validity of the rules which are under discussion in this case are nowhere there discussed.

In *Jones* v. *Clifford* (5 Fla., 510) three pilots were duly appointed at a certain point by the port wardens. No one but the official pilots could act. Two of the three port wardens advised an association of these three pilots, by which they took turns in watching, and divided the proceeds of their labors, ratably. The act providing for the appointment of pilots prohibited persons from acting who were not appointed, under a penalty, and left the regulation of them and the establishment of all such ordinances as they should deem advisable to the board of port wardens for the harbor. The court held that under the circumstances, the agreement among the pilots was not void.

It is apparent that in this case *there was no room for competition*, since none could act except the regular appointees. They formed a partnership under authority of

the port wardens. The case presents no features of a monopoly.

It is next urged (p. 92) that exchanges have been officially recognized in the annual reports of the Interstate Commerce Commission, etc. Inasmuch as they were known to Congress prior to the passage of the antitrust act, it is argued that Congress could not have intended to make them unlawful conspiracies.

The same argument was made in the Trans-Missouri Case. It was pointed out that the Interstate Commerce Commission, in its first annual report (1887, p. 33), not only referred to the various traffic and freight associations, but they were discussed and even commended. The same is also true of the second annual report (1888, p. 41), and of the third annual report (1889, p. 48); and this fact is commented upon by Mr. Justice White in the dissenting opinion; but that, notwithstanding the fact that freight associations were known to Congress and favorably reported to it by the Interstate Commerce Commission, it was held that they were within the terms of the antitrust act.

It is urged (p. 98) that "exchanges do not constitute combinations or conspiracies in restraint of trade. On the contrary, they promote and facilitate it."

In *Munn* v. *Illinois* (94 U. S., 113, 132), it appeared that the elevator business, as carried on in Chicago, had *promoted* and *facilitated* the grain business until it had assumed "immense proportions." But notwithstanding, the court said they were "virtual monopolies," and that the cause of the public was best served by placing restrictions upon them.

In promoting and facilitating trade, care must be taken *that lawful limits are not overstepped.* It might be conceived that trade would be promoted and facilitated in certain lines by an organization which should provide for the assassination of its rivals; and yet it would scarcely be possible for even an exchange to engage in such practices without making its members amenable to the criminal laws. So that the test of legality is not in itself the promotion of trade, but rather *the promotion of trade by lawful means.*

In support of this proposition, counsel cited *Cahlicott* v. *Griffiths* (8 Ex., 898), where it is held that the plaintiff, who was a printer, might recover from a society of which he was a member the reasonable value of a printing bill done by him at the request of the society, notwithstanding his membership.

Pollock, C. B., said:

> On referring to the society's rules, upon which the question turns, it appears to us that the circumstance of the plaintiff being a subscriber or member of the society does not in any way preclude him from maintaining an action against the members of the committee who personally ordered the work which was done for them. These rules do not constitute a partnership among the members or subscribers, and therefore they do not on that ground take away from the contributor his right of action against the members of the committee.

This was the only question decided.

Belton v. *Hatch* (109 N. Y., 593) is also cited in support of this same proposition. It appears that one

Des Marets, a member of the New York Stock Exchange, was expelled because insolvent, it appearing that his failure was caused by doing business in a reckless and unbusinesslike manner. His membership was accordingly sold by the exchange, and his assignee brought suit for the proceeds of such sale. It was held that the rule of the exchange, which provided that in such cases the proceeds of the sale of the membership should be disposed of by the committee on admissions, was reasonable, and did not contravene any rule of public policy.

The court said:

> In the case of a member who by misconduct, cognizable by the laws of the association, forfeits his right to continue to remain a member, there is reserved by the constitution the right to dispose of his membership. *These rules* are reasonable, and do not contravene any rule of public policy, and having been consented to by the plaintiff's assignor, deprive him of any interest or rights in the association of which he had ceased to be a member.

In reference to the cases cited (p. 99 et seq.), under the heading

"ASSOCIATIONS TO REGULATE THE MANNER OF CONDUCTING TRADE,"

it is important to note that "they were made under a condition of things and a state of society different from those which now prevail." (*Gibbs* v. *Consolidated Gas Co.*, 130 U. S., 396.)

In *Pierce* v. *Bartram* (1 Cowp., 269), an action was brought by the chamberlain of the city of Exeter against

the defendant for slaughtering two oxen within the city of Exeter contrary to a by-law made by the mayor and common council of the city of Exeter under a general power given them by charter, anno. 3 Eliz., to make by-laws. The by-law prohibited any butcher or other person slaughtering any animals within the limits of the city, and fixed a penalty of 20 shillings for every beast so slaughtered.

Lord Mansfield said:

> This is a very clear case. The by-law in question is not a restraint of trade, but only a regulation of it in this particular city, and it is made in confirmation of the act of Parliament which has been mentioned.

Cope v. *Rowland* (2 M. & W., 149) merely holds that a broker can not maintain an action for work and labor and commission for buying and selling stock, etc., *unless duly licensed* by the mayor and aldermen of the city of London, pursuant to 6 Anne, c. 16.

In *Green* v. *Weaver* (1 Sim., 404) the question was decided that—

> A broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission.

In *Scott* v. *Cousins* (L. R., 4 C. P., 177) it appears that by statute it was provided that anyone acting as broker within the city of London without license should be subject to a penalty of £100. A. having acted as a broker without license was held liable to the penalty.

In *Smith* v. *Lindo* (4 C. B. N. S., 395) it is held that a dealer in shares who acts as a broker without license is not thereby prevented from recovering remuneration for his services.

In *Robinson* v. *Kitchen* (21 Beav., 365) it is held that a man who holds himself out to the world as a sworn broker thereby impliedly asserts that he has taken the steps necessary to qualify himself to act as such, and he will be bound to give discovery to the parties employing him as a broker, respecting his dealings and transactions as such, though he may thereby subject himself to pecuniary penalties payable to the city of London for acting as a broker without payment of the fees imposed by 57 George 3, c. 9.

Under the heading (p. 102),

"REASONS FOR ESTABLISHING EXCHANGES,"

a number of authorities are cited.

It seems that the reasons are wholly immaterial in this case. They exist because there is *a necessity for a market.*

> The market rises to its highest efficiency and value when it concentrates into one focus so large a portion of the buyers and sellers of a certain commodity as to become, in conjunction with one or two other markets of the same kind, an authoritative standard of prices of the articles in which it deals for all buyers and sellers throughout the world. (Principles of Economic Philosophy, by Van Buren Denslow, p. 100.)

The cases cited, however, throw little or no light upon the subject under discussion.

Tompkins v. *Saffery* (L. R., 3 App. Cas., 213) is frequently cited in support of various propositions. It holds in substance that the rules of the London Stock Exchange are binding on its *members*, but not binding on *nonmembers*. A member became bankrupt, and his estate was disposed of by members of the exchange in accordance with their rules. His outside creditors objected and sued. They were allowed to recover from the Stock Exchange all of his assets for distribution among his general creditors.

The court said, in speaking of the rules in this respect (which was the only question under consideration):

> Therefore, although everything done in the domestic forum of the Stock Exchange under those rules may be done according to the rules, and may be most wholesome in its operation for the members of the Stock Exchange, still what is done must be subject to the rights *of those who are not amenable to the jurisdiction of the Stock Exchange; and when those higher rights come in conflict with these rules, of course these rules must give way to those higher rights.*

This is a very fair statement of the rule, and from a very learned court. The rule announced is not a new one. It merely says, in effect, that the rules of the stock exchange, or any exchange, or any voluntary association, are binding upon those who are members thereof, and who have agreed to be bound by such rules, *but that they can have no effect upon nonmembers. They can not override the law of the land.* As justly said, when the law of the land "comes in conflict with these rules, of course

these rules must give way to those higher rights." And so when the law of the land prohibits monopolies or conspiracies or contracts in restraint of trade, *the rules of an exchange or association can override it.*

Walls v. *Bailey* (49 N. Y., 464) was an action instituted to recover a balance alleged to be due to the plaintiffs for plastering the defendant's house.

It was held "that parties are presumed to contract in reference to a uniform, continuous, and well-settled usage pertaining to the matters as to which they enter into agreement, where such usage is not in opposition to well-settled principles of law and is not unreasonable."

No question of exchanges or the validity of their rules came under consideration.

In *Nickalls* v. *Merry* (L. R., 7; H. L., 530), it was decided that—

> A purchase or sale of shares made by one who is not a member of the stock exchange, and made through a broker who is a member of that body, will be treated as made subject to the rules of the stock exchange. The rules of the stock exchange imply that the name of the person given as that of the ultimate purchaser of shares must be that of one able and willing to purchase, and they are not satisfied if the name given is that of a nonexistent person, a lunatic, an infant, a married woman, or a person who has not given authority for the use of his name.

The rules of the exchange in this respect, and no other, were under consideration, and even then only as between persons members of the exchange or equivalent thereto, and they were held to be bound by them.

Speight v. *Gaunt* (L. R., 9 App. Cas., 1) is also cited under this heading. It was an action against the trustee to recover trust funds alleged to have been misapplied. The trustee employed a broker to buy securities. The broker gave the trustee a bought note which purported to be subject to the rules of the London Stock Exchange, and obtained the purchase money from the trustee upon the representation that it was payable the next day, which was the next account day of the London exchange. The broker never procured the securities but appropriated the money to his own use and eventually became insolvent. It was held by the court that the trustee was not responsible if he followed the usual and regular course of business adopted by ordinary, prudent men in making such investments.

In *Dillaway* v. *Alden* (88 Me., 230), it was held:

> *These devices* of the brokers to facilitate their transactions may bear to the superficial observer the appearance of jugglery rather than of regular buying, selling, and delivery; but a deeper and longer look will discover that they are appropriate means for the quick and economic transaction of large volumes of legitimate business.

Under the heading (p. 111),

"LEGAL STATUS OF TRADE USAGES,"

it is asserted that the rules of an exchange constitute "a codification of trade usages, and that it is recognized in many cases."

This may be true, but it is also a significant fact that in the codification of *trade usages* it has never been supposed or understood *that an exchange has the right to pass*

such by-laws as are challenged as illegal in this case. This will appear from an examination of the cases cited under this heading.

Goodwin v. *Roberts* (L. R., 10 Ex., 337) holds that—

> Scrip issued in England by the agent of a foreign Government, by which the holder is entitled, on payment in full of the installment due from him, to delivery by the agent of definitive bonds of the foreign Government on their arrival in this country, which by the usage of bankers and dealers in public securities, is transferred by delivery, passes by such delivery to a *bona fide* holder for value without title.

In other words, the usages of bankers and dealers in buying securities when known and universally recognized, constitute a part of a contract made where such custom obtains. This is, of course, familiar law.

To the same effect is *Renner* v. *Directors, etc.* (9 Wheat., 581), where it is held that—

> By the custom of the banks in the District of Columbia, payment of a promissory note is to be demanded on the fourth day after the time limited for the payment thereof, in order to charge the indorser, contrary to the general law merchant, which requires a demand on the third day. Evidence of such local custom is admissible in order to ascertain the understanding of the parties with respect to their contracts made in reference to it.

So, in *Ousequa* v. *Willings* (1 Pet. C. C., 225), it is held that—

> When a usage is so proved as to leave no doubt of its existence, it becomes a part of the law, and the court will decide on it as such without requiring it to be again proved.

To the same effect is *Brandao* v. *Barnett* (12 Cl. and Fin., 786), which was an action for converting exchequer bills. It was there decided that—

> A general lien of bankers is part of the law merchant, and is to be judicially noticed like the negotiability of bills of exchange.

In *In re Cutford* (15 Rep., 3) it is said:

> Warehousemen in the city of Bristol have, by the custom of the city, a general lien over all goods warehoused with them—other than goods in respect to which warrants have been issued—for all warehouse rent, laborage, haulage, and any other charges incurred or becoming payable in connection with such goods, or with any other goods warehoused by the same individual, either before or after.

In *Leach* v. *Beardsley* (22 Conn., 404) it is held that—

> In the absence of clear stipulations in contracts, usage of trade or business is often proved to show the actual intent and purpose of the parties; and a general usage affecting any branch of business furnishes good evidence of what is required as right and reasonable in that respect; so that negligence or misconduct can not be imputed to a party who conforms to such usage.

In *McMasters* v. *Pennsylvania R. R. Co.* (69 Pa. St., 374) it is said:

> A custom so long persisted in as to be known and practiced by a community is the law of the particular business in which it exists, and the presumption arises that it is in the view of parties who contract about this subject-matter.
>
> To establish such custom it should be reasonable, continued, and acquiesced in by all coming within its operations.

In *Baxter* v. *Rodman* (3 Pick., 435) it was held that a reasonable usage was binding on the owners of ships engaged in the whaling business in cases where the masters are not prohibited from making such contracts.

In *Kershaw* v. *Wright* (115 Mass., 361) it is said:

> On the issue whether a usage exists in a city to inspect a certain kind of provisions, evidence that the rules of a chamber of commerce having the power, given to it by the acts of incorporation, to appoint an inspector of provisions, and one of the purposes of which was declared to be "to establish and maintain uniformity in the usages of the city," said nothing about the kind of provision in question, while they provided for the inspection of many other kinds, is admissible to show the nonexistence of the alleged usage.

In *Excringham* v. *Lord* (19 Ill. App., 565) it is held that—

> No usage or custom can be set up in contravention of the express terms of a contract, but a usage or custom may add new terms not expressed in or covered by the contract which are not incidental and not repugnant to it.

It is not perceived how these authorities may aid the court in the determination of the questions here involved. What they decide may be all summed up as follows: Custom can not override the express terms of a contract, but when a contract is made in a locality where there exists a custom which is universal, uniform, and notorious the parties are presumed to have contracted with reference to such custom; and so far as it is applicable, it may be regarded as incorporated within the body of

the contract. When a custom or usage becomes universal it may, in time, come to have the force of law. How this may aid the court in the determination of the question at issue is not apparent.

But the custom of usage which is thus incorporated into a contract must be a *lawful one*, and one resulting from the natural conduct of business *without artificial means*. Thus it is held in *Lovejoy* v. *Mitchell* (88 Mich., 15) *that the prices fixed by an association are not entitled to be proven as evidence of value*.

On page 114 numerous cases are cited under the heading,

"RULES FOR THE ORDERLY CONDUCT OF BUSINESS REGULATING COMPENSATION FOR SERVICES RENDERED."

It might be reasonably expected that somewhere among the forty-five citations under this heading the attention of the court will be directed to some *judicial determination that exchanges, or some similar organization, have the right to agree upon a minimum schedule of prices and charges*.

Let us make an examination, and ascertain if our expectation will be verified.

In *Perkins* v. *Lyman* (9 Mass., 521) it is held that—

> Where one, for a valuable consideration, covenanted that he would not be directly or indirectly interested in any voyage to the northwest coast of America, or in any traffic with the natives of that coast for seven years, it was holden that such contract was not void as against the policy of the law, being in restraint of trade; and that it was a breach

of the covenants for the covenantor to own and fit a vessel for such voyage, although before her departure he divested himself of all interest in the vessel and cargo.

In *Leslie* v. *Lorillard* (110 N. Y., 519) there was an agreement to restrain *competition*, but it was held to be valid on the ground that the restraint was not *unreasonable*.

In *Grissell* v. *Bristowe* (L. R., 4 C. P., 361) it appeared that the usage of the stock exchange was that, in transactions between members of it, there is an implied understanding that, on the purchase of stock or shares, the buying jobber shall be at liberty by a common day, called the "name" day, to substitute any other person as buyer, and so relieve himself from further liability on the contract, provided such substituted person be one to whom the original seller can not reasonably except, and that such person accept a transfer of the stock or shares and pay to the original seller the price. It was held that this usage, being founded on the general convenience of all persons engaged in a particular business, can not, as regards such person, be said to be unreasonable. This rule and no other was under consideration.

In *Duncan* v. *Hill* (L. R., 6 Ex., 259) there is reported the following case:

> The plaintiffs, brokers on the London Stock Exchange, were instructed by the defendant, who was not a member of the house, to buy certain shares in various public undertakings for him for the account of the 15th of July, 1870. Subsequently he told the plaintiffs to carry over the shares to the account

of the 29th of July. This was done, and the defendant was furnished with an account showing him to be liable to a difference of £1,688 19s. On the 18th of July the plaintiffs were declared defaulters, and, in accordance with the rules of the stock exchange, all their transactions were closed and accounts made up at the prices current on that day, without the knowledge of or any reference to the defendant. The result was that there was a difference against the defendant of £6,013 13s. 5d. In an action to recover this sum—

Held, that the rules of the stock exchange, regulating the mode of dealing with defaulters, bound the defendant; that the plaintiffs, though themselves the defaulters, might take advantage of those rules, and that therefore they were entitled to recover.

The question there considered and determined was whether, upon contracts made upon the stock exchange between its members and according to its rules and usages, it would be reasonable that the principal should be identified with the agent or broker and bound and liable as the agent himself is to the performance of the contract made in all its incidents and with all its consequences.

In *Cordell* v. *Hall* (34 Fed. Rep., 866) and in *Hall* v. *Cordell* (142 U. S., 116) the sole question was in reference to a verbal agreement made in Missouri to accept and pay on presentation at the place of business of the promisor in Illinois all drafts drawn upon him by the promisee for live stock to be consigned by the promisee from Missouri to the promisor in Illinois; and it was held that this was to be determined by the law of Illinois and not by the law of Missouri. There was no question raised or discussed or decided in reference to the

matter of commissions. The word is mentioned once, incidentally, in the same manner that Chicago is mentioned. One is as important as the other. It can be no more said that the court gave its sanction to the commissions in that case, although it is not disclosed whether they were fixed by a rule of the exchange or otherwise, than that it gave its sanction to the politics or morals of the city of Chicago.

In *Rorke* v. *San Francisco Stock and Exchange Board* (99 Cal. 196) the sole question involved was the constitution and by-laws, by which it was provided that any member failing to meet his engagements in the board should be suspended until he had settled with his creditors. It was held that—

> Where a member has been suspended from his seat or membership in the board and his right thereto sold to satisfy a lien thereon for debts contracted by him as a member, his membership therein ceased and all his rights pertaining thereto were extinguished, and mandamus will not lie to compel his restoration to membership.

In *Bangs* v. *Hatwick* (30 Fed. Rep., 97) the controversy was over a promissory note, alleged to have been given for a gambling debt in speculating in stocks, apparently on the Chicago Board of Trade. No other question was considered or passed upon.

In *Gilbert* v. *Gangar* (8 Biss., 214) the question again arose as to the validity of transactions on the board of trade, and the defense was that the transaction was void as a gambling debt. Plaintiff was permitted to recover for the difference paid by him in behalf of defendant, as

well as for all his commissions; but whether the commissions were fixed by the board of trade or whether they were determined by contract or by expert testimony is nowhere disclosed. No question was raised in reference to them.

In *Irwin* v. *Williar* (110 U. S., 499) the question of the legality of certain transactions on the Corn and Flower Exchange of Baltimore was under consideration. It was held, following *Robinson* v. *Mollett* (L. R., 7 H. L., 802), that the custom of the board of trade in the matter of the settlement of differences was not binding upon a member without his assent. No question of the legality or validity of commissions was considered or decided.

Roundtree v. *Smith* (108 U. S., 269) is another case where a Chicago Board of Trade transaction was assailed as a gambling contract. The suit was to recover the reasonable worth of services in the purchase of pork, etc., and making sales thereof, and in making advances. The only question discussed or decided was whether the contract of purchase and sale were gambling contracts.

In *Hansborough* v. *Neal* (27 S. E. Rep., 593) it was decided that "a real estate agent seeking to recover commissions for negotiating a sale, where no contract was made in regard thereto, may prove the custom as to the rate of commissions, and the time of payment, in the place where the business was done and the land sold."

In *Lacer* v. *Hotaling* (46 Pac. Rep., 1070) the action was by architects to recover for services, and it was held that evidence of a rule of compensation of architects established by architects' institutes and associations was not admissible when not accompanied by any proof that the

rule was known to the defendant at the time of the alleged contract, or that it was so generally accepted by the public as to give it the standing of a custom, knowledge of which was to be imputed to him.

The right of architects by their institutes or associations to fix rules of compensation was not considered or decided.

In *Thomas* v. *Brandt* (26 Atl., 524) it is held that—

> Where there is a custom by which real estate agents are entitled to a commission of $2\frac{1}{2}$ per cent on large transactions, in the absence of a special agreement to the contrary, an owner who promised to pay a broker the "usual commission" for effecting a sale of his land is bound to pay the $2\frac{1}{2}$ per cent, though he supposed that a smaller rate was the customary brokerage in large transactions.

In *Sewell* v. *Corp.* (1 C. & P., 393) it is held that—

> The certificate of a veterinary college that the plaintiff had attended lectures there is not admissible in evidence, as not coming from a body known to the law. If there is a general usage applicable to a particular trade or profession, a person employing one in such trade or profession will be taken to have dealt with him according to that usage; but a usage for a veterinary surgeon to charge for his attendances, when there was not much medicine required, is too uncertain.

In *Kraft* v. *Faucher* (44 Md., 204) it is said:

> It is now well settled, in the absence of any clear expression to the contrary, that he who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must

be taken as intending that the contract may be made according to the usage of that place; and in this case it is quite immaterial that the principal himself is unacquainted with the usage or custom with reference to which his agent or factor may deal.

In *Perin* v. *Parker* (126 Ill., 200) a question arose under the rules of the Chicago Board of Trade in reference to the requirement of margins, and that is the only question decided.

In *Bailey* v. *Bensley* (87 Ill., 556) the main controversy, according to the court, was—

> In respect of these warehouse receipts, appellant insisting that the receipts issued upon the storing of his grain were his property, and that when appellees were directed by him to hold certain grain until he ordered its sale, it was their duty to retain the identical warehouse receipts issued for that grain; whereas appellees maintain that, according to the usage and custom in the transaction of business by commission men doing business on the board of trade in Chicago, in holding the grain or in making sales of it on account of any particular shipper, no attention is paid by the commission man to the matter of holding or transferring the identical receipts which were received by him, and when that person's grain was received into the warehouse, etc.

In *Peabody* v. *Squires* (56 N. Y., 230) it is said:

> In an action upon a coal contract between members of the New York Coal Exchange, its constitution subscribed by them and the by-laws made by the members are competent evidence, and the provisions thereof prescribing the mode of performing such contracts between members for this purpose become part of the contract.

In *London Association* v. *Clark* (L. R., 20 Q. B. D., 576) it is said:

> A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the stock exchange. In accordance with the practice of the stock exchange the transferee of the shares paid the price of them to the vendor upon delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of the association, in their discretion, to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company.

And this was held proper.

In *Cruse* v. *Paine* (L. R., 6 Eq., 641) the following case was under consideration:

> Plaintiff, on the 2d of November, 1865, through his brokers, sold 100 shares to the defendants, who were stock jobbers. The sale note expressed that the sale was by order of the plaintiff; that it was "subject to the rules of the London Stock Exchange," and "with registration guaranteed;" also that payment was to be made on the 15th of November following. Shortly before this date the defendant sent to the plaintiff's brokers the name of H. as transferee, with the purchase money, and the transfers were executed by plaintiff to H. and handed to his brokers. The transfers not having been registered, the defendants, in December, 1866, obtained a decree for specific performance by H. of the contract with them, and for indemnity. Meantime the company had been wound up, and the plaintiff's claim, being still on the register, was settled on the

list of contributories. He then filed this bill against the defendants for specific performance and indemnity.

Held, that stock jobbers are principals and personally liable upon the contracts into which they enter.

Held, further, that the above facts did not disclose a novation of, or substitution of another contract for, the original contract; and that the plaintiff was entitled to a decree for specific performance, and indemnity.

In *Mitchell* v. *Newhall* (15 M. & W., 308) it is said:

The defendant gave to the plaintiff, a broker on the stock exchange, an order to purchase for him 50 shares in a foreign railway company. At that time no shares of the company were in the market, the foreign Government not having yet authorized its establishment; but letters of allotment for shares were then, according to the evidence of persons on the stock exchange, commonly bought and sold in the market as shares. The plaintiff bought for the defendant a letter of allotment for 50 shares.

Held, that a jury might well find that this was a good execution of the order.

In *Sutton* v. *Totham* (10 A. & E., 27) it is held that "a person who employs a broker on the stock exchange, impliedly gives him authority to act in accordance with the rules there established, though such principal himself may be ignorant of the rules."

Ward v. *Vosburgh* (31 Fed. Rep., 12) involved the question whether a certain deal made on the Chicago Board of Trade was a gambling transaction. The action was for advances and commissions. How the commissions were to be determined, whether by contract, by

rule of the board of trade, or by evidence of reasonable value, does not appear. No issue of that sort was made or determined. It was held that—

> A speculator who is familiar with the methods and usages of the Chicago Board of Trade is presumed, upon giving orders to his broker, a member of that body, to contract with reference thereto; and he will not be heard to set up as a defense to a suit by the broker for commissions and advances that the custom prevailing there, in obedience to which the advances were made, enlarged his liability under the contract.

Clark v. *Foss* (7 Biss., 540) is another case where Chicago Board of Trade transactions were attacked as gambling devices. It was held that the particular transaction under consideration should be upheld.

In *Maxted* v. *Paine* (L. R., 6 Ex., 132) the rules of the stock exchange in reference to the transfer of shares was under consideration. The court said (p. 142):

> The rules appear to have been framed for the twofold purpose of giving all possible facility for the transmission of shares from hand to hand in the interval between the purchase and the settling day, and also of securing and enforcing by the agency of a domestic tribunal the *bona fide* performance of the contracts.

In *Steward* v. *County* (8 M. & W., 160) it is said:

> In an action for the nonacceptance of railway shares, which, by the contract (made in Liverpool, through brokers), were to be delivered in a reasonable time, a written rule of the Liverpool Stock

Exchange, stated to be acted upon by all the Liverpool brokers—"that the seller of shares was in all cases entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he was acquainted with the name of his transferee"—was held admissible on an issue whether the plaintiff, within a reasonable time, was ready and willing and offered to transfer the shares, although it was not proved that either of the parties or their brokers was a member of the Liverpool Stock Exchange.

The case of *Bayliffe* v. *Butterworth* (1 Ex., 425) is as follows:

The defendant, who resided some distance from Liverpool, authorized the plaintiff, a broker there, to sell for him twenty railway scrip shares. The plaintiff sold them to C., another broker of Liverpool. The scrip shares were not delivered on the day, and C. bought twenty other scrip shares at the market price, and claimed the difference between the contract and the market price. The plaintiff paid him the difference and brought an action for money paid to recover this sum. It was proved to be the usage among brokers at Liverpool to be responsible to each other upon these contracts, and there was evidence that the defendant was cognizant of this usage:

Held, that the defendant was liable.

Kock v. *Emmerling* (22 How., 69) is as follows:

Where an agent was employed to sell an estate in Louisiana and the owner refused, without sufficient reason, to fulfill an agreement which the agent had made, a right to demand compensation accrued to the agent, the amount of which is to be settled by established usage.

In *Gillespie* v. *National Bank* (41 Fed. Rep., 231, and 137 U. S., 411) the following question was decided:

> A bank receiving on deposit from a factor, under the circumstances set forth in this case, moneys which it must have known were the proceeds of property of the factor's principal, consigned to him by the principal for sale on the principal's account, of which moneys the principal was the beneficial owner, can not as against the latter appropriate the deposits to the payment of a general balance due to the bank from the factor, and if it attempts to do so, the remedy of the principal against the bank is in equity and not in law.

In *Hitch* v. *Hawley* (132 N. Y., 212) the following ruling was made:

> A corporation organized under the act of 1877, providing for the organization of exchanges or boards of trade, may be dissolved by the court upon petition and consent of a large majority of its trustees and members, when it appears that it is doing no business because of the diverse interests of its members, although the corporation is solvent and a minority of the trustees and members oppose the dissolution.
>
> When it appears that the interest of the stockholders of such a corporation are so discordant as to prevent efficient management, and that a large majority of its trustees and members wish to wind up its affairs by a dissolution, the fact is established that the dissolution will be for the interests of the stockholders.

The quotation referred to in plaintiff's brief, page 118, is taken from the testimony of certain witnesses.

In *Jones* v. *Powell* (6 Beav., 488) it is held that—

> An executor, upon transferring stock to a legatee, paid one-sixteenth per cent to a stock broker for *identifying* him at the bank. He was allowed the payment in passing the accounts.

In *Davenport* v. *Powell* (14 Sim., 275) it is held—

> A party who has been ordered to transfer large sums of stock into court, paid the broker at the rate of 1s. 3d. per cent for *identifying* him on making the transfer.
>
> *Held*, that the payment was proper and ought to be allowed in taxing the parties' costs.

The court said:

> It is is admitted that in the case of a transfer to a party it is usual to allow the broker one-sixteenth—that is, 1s. 3d. per cent upon the same transfer.

It does not appear that these charges were "the usual commissions, being those fixed by the schedule of an exchange," as stated in appellants' brief.

It is thus made apparent that not one of the numerous cases cited and relied upon by counsel under this heading sustains the claim that exchanges *may by rule adopt a minimum commission for services rendered*. On the contrary, in not one case was the question of the right to fix a commission or rate of remuneration considered or determined. Had there been any such case, it is reasonable to suppose that the extensive and exhaustive research of counsel would have discovered it, and that it would here be referred to for the convenience of the court. No such case having been found, are we not justified in assuming that none exists?

Counsel for appellants (p. 119) propound

A SERIES OF INQUIRIES,

and ask, If usages tend to the convenience of the public and are to the benefit of the trade, how can a codification of them be held to be illegal? We are not aware that anyone is urging their illegality. It may be, as appellants suggest, that "a court will adopt an exchange rule as evidence that a usage codified therein is so notorious that judicial notice may be taken of it;" but it nowhere appears that *any court has ever adopted any such usage or any such rule as is here complained of as illegal.*

It is also asked why London has continued to be the great financial center of the world in spite of the efforts of the stock exchange to restrain the trade of that city. As before stated, the London Stock Exchange is under the supervision of the Government. The rates of commissions are fixed and established by law. It does not appear to have any by-law restricting the number of employees of its members, or restraining the sending of telegraph or telephone messages, nor does it appear that the members of the exchange have an exclusive right or arrogate to themselves the exclusive right of dealing in stocks in the city of London. It is quite likely that such an institution would not be tolerated, even in the absence of an antitrust act.

Counsel also desire to know how it has been possible for Chicago to become the largest grain and live stock market in the world in spite of the existence of two exchanges. As to the legality of the Chicago Live Stock Exchange, counsel are respectfully referred, for an answer,

to the opinion of the Supreme Court in *People* v. *Chicago Live Stock Exchange* (48 N. E. Rep., 1062).

We are willing to concede the truth of the statement of counsel that large cities, such as Chicago, New York, Philadelphia, Baltimore, etc., have established exchanges. It is also true that those cities have banks, mercantile houses, and other enterprises of various kinds; but because banks are necessary in cities in order to promote and facilitate trade, it has never been supposed that they were thereby given a license to violate the law, or that if their officers were guilty of infractions of the law they could point to the existence of banks and their beneficial influence upon commerce as a complete answer to a charge of criminal conduct; and the same may be said of mercantile and other enterprises.

It is insisted that all exchanges "are framed on the same model." This is respectfully denied, except as, in a very general way, it may be said that all men are framed on the same model; but it is nevertheless true that some are law-abiding and others criminal. So it may be said that all churches are, in one sense, framed on the same model and have the same general purpose; but this could scarcely be pleaded in defense of a member of the Mormon Church who had trangressed the laws.

It is also said that "all live stock exchanges have precisely the same rules and regulations." The record does not disclose whether this statement is correct or not. If it be true, it does not argue much in behalf of the appellants, since, so far as they have been tested, the Kansas City Live Stock Exchange and the Kansas City

Traders' Exchange have each been held illegal by circuit courts of the United States, and the former also by the Kansas court of appeals; the Chicago Live Stock Exchange has been held to be illegal by the supreme court of Illinois, and the Omaha Live Stock Exchange has been attacked in a similar manner.

May we be permitted to imitate counsel for appellants in also propounding

"A SERIES OF INQUIRIES?"

If exchanges promote trade and facilitate commerce, and if the object of this particular exchange is to "promote and protect all interests connected with the buying and selling of live stock at Kansas City, and to promote and enforce among the members correct and high moral principles in the transaction of business," as set forth in the by-laws, *why are they not willing to operate the exchange for the accomplishment of these high moral aims?*

Why is it necessary that nonmembers of the association should be *prohibited from doing business in competition with them?*

Why is it that the exchange includes *not only* commission men (for whom alone, by its rules, it seems to be adapted), *but also the packing houses*, and so combines under one management both the sellers and the buyers?

Since the avowed purpose of the exchange is to promote honorable conduct and "high moral principles," why is this purpose not satisfied *by permitting nonmembers to sell to the packing houses, provided such nonmembers may be able to offer attractive bargains, with a sufficient guaranty of their "high moral principles?"*

Why would it not be a *complete vindication of the purpose of the exchange*, in promoting and enforcing "correct and high moral principles in the transaction of business," if there were *two sets of commission men* at Kansas City, one belonging to the exchange, the other composed of nonmembers? The packing houses (who are the buyers) would then have a choice in making their purchases from members or nonmembers. If, as appellants contend, the inculcation of high moral principles by the exchange would be so complete as to make the members and their bargains *especially attractive to the packing houses*, they would have nothing to fear from *the competition of nonmembers*.

Why are the appellants *unwilling* to apply to their business the test of *free competition* in the matter of their charges, since that is the rule of trade of this country and must apply equally to merchants, lawyers, doctors, and men of every class?

Why is it that *50 cents* per head commission is now charged instead of *25 cents* per head, the commission charged *before the formation of the exchange*?

Why is it that an entrance fee of $2,500 is now charged for admission to the exchange, *unless it be that that is the price which the privilege of monopoly commands*?

Why is it necessary that the solicitors of the various members should be *restricted to three*, or *prepaid messages prohibited*, unless it be to *prevent competition*?

Is there any reason why the elimination of these rules, so objectionable to the policy of this country, will not satisfy the *appellants' zeal in the promotion of "high moral principles in the transaction of business,"* without

combining to *crush out competitors*, who are willing, if they can, to engage in commission business even with the *odium* which would attach to them by exclusion from this high-moral-principle-producing combination?

If we were to concede to be true all that is said in praise of exchanges, the fact still remains that appellants could organize and operate an exchange *containing all of the blessings which flow from that form of combination* by *eliminating* from their rules those which are here challenged as unlawful. *If the same consummate ability were employed in remodeling the exchange on legal lines as is now displayed in seeking to evade legal responsibility, this result would doubtless be accomplished.*

A number of authorities are cited (p. 121) under the heading of,

"CONTRACTS TO FACILITATE TRADE."

The distinction is pointed out between contracts or combinations to restrain trade and those entered into for the purpose of facilitating trade and which effect its promotion. Counsel cite *Cannon* v. *New Orleans* (20 Wall., 577); *Packet Co.* v. *Keokuk* (95 U. S., 80); *Sands* v. *Manistee River Improvement Co.* (123 U. S., 288); which hold that in respect to wharves and the removal of obstructions from rivers and the making of a reasonable charge therefor they belong to the class of subjects over which the States and the National Government have concurrent jurisdiction. They are local and not national in their character, and the nonaction of Congress gives to the States power to legislate in this respect until Congress shall assume jurisdiction itself. As before pointed out in the case at bar, Congress, by the act of

July 2, 1890, has assumed jurisdiction, *even as to these matters*, in respect of contracts, combinations, and monopolies in restraint of trade, so that the rule of these cases has now no application.

Taff Vale Railway Co. v. *McNabb* (L. R., 6 H. L., 169) is cited by appellants in support of the proposition that contracts to facilitate trade are not in restraint of trade. No such question is involved in that case as entitles it to the emphasis given it by appellants.

The court says:

> It was contended that the covenant for the breach of which the action was brought was void as being in restraint of trade. No doubt, if a person is, *without consideration*, prohibited from carrying on trade, either absolutely or within an unreasonable distance from another, the prohibition is against public policy and void. But I can not see how the covenant in question falls within the principle. The trustees leased to the directors land on the east side of the Bute Dock, to enable them to use the dock for the shipping and unshipping of traffic conveyed to and from their railway. The trustees grant to them the privilege of using the dock and the land leased and afford them facilities for the use upon a payment to be made in a particular mode. It may be that this mode of payment is not a desirable one, and that more is exacted by the way of consideration than ought in prudence to have been agreed to; but how it can be considered to be in restraint of trade I can not conceive. It is not a prohibition but a permission to carry on trade. *The directors tie their hands only by saying that, in consideration of the advantages they will enjoy by the use of the dock, if they carry their goods anywhere else they will pay as if they had used the dock.*

Central Shade Roller Co. v. *Cushman* (143 Mass., 353) is also cited. This case can scarcely be called authority at the present day under the act in question, since the court says:

> The general purpose of the combination was to *prevent* or rather to *regulate competition* between the parties to it in the sale of the particular commodity which they made. This was a *lawful purpose*.

In *Stephens* v. *Southern Pacific Ry. Co.* (109 Cal., 86) it is held that:

> The covenant in the contract of lease that the railroad company should not be responsible for any damage caused by fire is valid, and not void as against public policy; nor are the dangers and risks to the public as to the destruction of its property by fire in any degree increased by the covenant between the parties.

Just what bearing this case has upon the subject under consideration is not apparent.

THE STATUS OF COMPETING NONMEMBERS.

This heading is misleading. In appellant's exchange there are no "competing nonmembers." Competition does not exist. It would, perhaps, have been more accurate to have headed the discussion "Status of nonmembers who are not permitted to compete."

The opinion of Judge Taft (62 Fed. Rep., 820) is cited in support of the proposition that "the normal operation of the right to labor is the securing of better terms by refusing to contract for labor except on such terms." This is true; but it is also true that laborers

have no right to interfere with the *rights of others*, and this is pointed out by Judge Taft (p. 818):

> All the employees had the right to quit their employment, but they had no right to combine to quit, *in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person*, for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their services. *It is the motive for quitting, and the end sought thereby, that make the injury inflicted unlawful and the combination by which it is effected an unlawful conspiracy.*

The court also quotes with approval the following cases, which sustain our position here:

> *Temperton* v. *Russell* (1893), 1 Q. B., 715.
> *State* v. *Glidden*, 55 Conn., 46.
> *State* v. *Stewart*, 59 Vt., 273.
> *Steamship Co.* v. *McKenna*, 30 Fed. Rep., 48.
> *Casey* v. *Typographical Union*, 45 Fed. Rep., 135.
> *Toledo Railway Co.* v. *Pennsylvania Co.*, 54 Fed. Rep., 730, 738.

The application of the act of July 2, 1890, to the state of facts there under consideration is declared.

In this connection it may be stated that in *Angle* v. *Railway Co.* (151 U. S., 1, 12, 14), Mr. Justice Brewer cited with approval *Lumley* v. *Gye*, El. & Bl., 216; *Bowen* v. *Hall*, 6 Q. B. D., 333, 337; *Walker* v. *Cronin*, 107 Mass., 555.

In speaking of the rule of these cases Mr. Justice Brewer said:

> In the opinion of Brett, L. J., it was said, "that wherever a man does an act which in law and in fact

is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie."

Bonsack Machine Co. v. *Smith* (70 Fed. Rep., 383) is also cited. The court there says:

> Any interference by any department of the Government with *open competition in the markets would stifle trade and finally drive out all competition.* "If there is one thing which public policy requires more than another it is that men of full age and competent understanding shall have the *utmost liberty of contracting.*"

Attention is also called to *United States Chemical Co.* v. *Provident Chemical Co.* (64 Fed. Rep., 946). There the court says (p. 950):

> Combinations in the nature of modern trusts, so soundly condemned, *are those which aim at a union of energy, capital, and interest to stifle competition and enhance the price of articles of prime necessity and staples of commerce.*

In *White* v. *Baxter* (9 J. & S., 358) it is held that a broker buying stock in behalf of a client is personally bound to the seller, and if the client refuses to provide margins, the broker may have his action to recover the amount of his own liability.

In *Walls* v. *Bailey* (49 N. Y., 464), also cited, the action was instituted to recover a balance alleged to be due to the plaintiffs for plastering the defendant's house. The only ruling made by the court was that the "parties are presumed to contract in reference to a uniform, continuous, and well-settled usage pertaining to the matters as to which they enter into agreement, where such

usage is not in opposition to well-settled principles of law and is not unreasonable."

The following cases are also cited on this proposition:

Peabody v. *Norfolk*, 98 Mass., 452.
Salomon v. *Hertz*, 40 N. J. Eq., 400.
Thum v. *Tloczynski*, 72 N. W. Rep., 140.
Washburn v. *Nat'l. Wallpaper Co.*, 81 Fed. Rep., 17.

The last case holds that "the good will of the business is property and may have a value independent of any particular locality or any specific tangible property, and stock of a corporation issued for such good will is issued for property actually received within the meaning of the New York stock corporation law." The other three cases simply hold that the knowledge of an employee of secret processes of manufacture, gained by him during his employment, must not be divulged, and injunction will issue to prevent the employee from making use thereof. The pertinency of these cases is not apparent.

THE ADVANTAGES OF EXCHANGES.

It is said that "trade is promoted, better facilities provided, fixed and reasonable rates established," etc.

The same might be said of the elevators in *Munn* v. *Illinois* (94 U. S., 113), of *Cotting* v. *Kansas City Stock Yards Co.* (82 Fed. Rep., 850), and various other cases which are denominated by the courts monopolies, to the extent that regulation is beneficial.

It is stated by counsel (p. 127) "that the courts—American, English, and French—by a long and unbroken

line of authorities, adjudge such an association to be 'a lawful body, organized for lawful purposes' (*Bibb* v. *Allen*, 149 U. S., 489), and its rules 'to be deserving of no animadversion whatever' (Lord Chancellor Cairns, 3 App. Cas., 220), and not to be 'open to objection on the ground of public policy' (Mr. Chief Justice Fuller, 142 U. S., at 12; Sawyer, J., in *Hyde* v. *Woods*, 2 Sawyer, 655), and declare their purpose to be a 'laudable one' (*In re Haebler*, 149 N. Y., 414; *State* v. *Chamber of Commerce*, 47 Wis., 685)."

Bibb v. *Allen* does not decide that any exchange was "a lawful body, organized for lawful purposes." The issue in the case was the legality of a certain sale on the New York Cotton Exchange. The answer claimed that the sales were "wagers, bets, and gambling transactions." Whether or not there were rules of the exchange regulating commissions does not appear. One of the errors assigned related to the admission in evidence of the statutes of New York under which the New York Cotton Exchange was organized, together with the rules and regulations of that body, under and in pursuance of which the transactions in question were conducted. The court held that the evidence was competent, because the contracts entered into contemplated that the business would be done in accordance with the rules of the New York Cotton Exchange.

The court said:

> It was proper, therefore (referring to the admission of the rules and statutes), to show that this cotton exchange was a lawful body, organized for lawful business purposes, and had power to make such

> rules and regulations as might be deemed necessary and proper to carry out the purpose of its organization.

It may be remarked, in passing, that the appellants are now claiming that this court should take judicial notice of the rules and regulations of all the various exchanges—American, English and French—which claim seems to be opposed by the foregoing case.

The rules under consideration in *Tompkins* v. *Saffray* (3 App. Cas., 213) were rules in reference to the disposition of the assets of a bankrupt member, and not such rules as are here in controversy.

In *Sparhawk* v. *Yerkes*, (142 U. S., 1) and *Hyde* v. *Woods* (94 U. S., 523, s. c. 2 Woods, 655) it was held that—

> The *ownership of a seat in a stock board is property*, not absolute and unqualified, but limited and restricted by the rules of the association. *Such rules, in imposing the condition upon memberships that the proceeds should be first applied to the benefit of creditor members*, are not open to objection on the ground of public policy or because in violation of the bankrupt act.

In *In re Haebler* (149 N. Y., 414) it was decided that a member of an exchange may be expelled for improper conduct. This and nothing more.

In *State* v. *Chamber of Commerce* (47 Wis., 685) a by-law was sustained which fixed the place where the meetings of the association should be held and prevented their being held at other places.

It is apparent that when counsel speak of "an association" and say that it has received the approval of so

many courts the statement is unintentionally misleading. The rulings made by the various courts in the cases cited are well-settled law and militate in no degree against the position of the Government in this case.

In further support of the advantages of exchanges appellants cite the case of *Bangs* v. *Harwick* (37 Fed. Rep., 97), where the controversy was over a promissory note, alleged to have been given for a gambling debt in speculating in stocks, apparently on the Chicago Board of Trade. No other question was considered or passed upon.

Hanson v. *Boyd* (161 U. S., 397) was a case where certain transactions conducted on the board of trade at Chicago were challenged as gambling transactions.

The charge of the lower court was as follows:

> If the contract is lawful, the putting up of *margins* to cover losses which might accrue from fluctuations in prices in final settlement of the transaction according to the rules and usages of the board of trade of the city of Chicago is entirely proper and legitimate. These rules have been read to you by counsel for plaintiffs, and there is nothing in these rules on their face that indicates that they are in violation of the laws of Illinois or contrary to public policy.

The court is speaking of option contracts, and finds that the rules, "on their face," have apparently been so skillfully drawn that the illegality, if any, has been concealed or disguised. There is absolutely nothing in this case indicating, even remotely, that rules or by-laws such as are in controversy in this case were there passed upon

or approved or disapproved, nor were the advantages of exchanges discussed.

The other cases cited have absolutely no bearing which we can discover.

Upon the subject of clearing houses and the history, objects, operations, and rules of prominent exchanges, the Paris Bourse, the London Stock Exchange and its rules, the New York Stock Exchange and its rules, and various other exchanges, to which so much prominence is given in appellants' brief, we desire to make no other reply than to say that it is inconceivable to us how the discussion can in any possible way affect this controversy.

At page 227 of appellants' brief there is a discussion of

"AGREEMENTS NOT TO DEAL WITH OTHERS."

Matthews v. *Associated Press* (136 N. Y., 333) is cited in support of the appellants' position; but it is apparent from a reading of the report that it has little bearing on the questions involved, since the restraint there is held to be *reasonable*, and therefore not against public policy.

The court said (p. 341):

> It seems to me this by-law is a natural and *reasonable restraint* upon the members of the association, appropriately regulating their conduct as members thereof with respect to the business which the association was specially organized and incorporated to transact.

The case does decide that *there was a restraint imposed by its by-laws*, and the inference is irresistible that if there had been a statute, as in this case, which made restraints unlawful, *whether reasonable or unreasonable*, the association would have fallen within its condemnation.

Commonwealth v. *Hunt* (4 Mete., 111) draws the distinction between an association which is lawful and one which is unlawful.

The court said:

> The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes or *for dangerous and pernicious ones.* If the latter were the real and actual object, and susceptible of proof, *it should have been specifically charged.* Such an association might be used to afford each other assistance in times of poverty, sickness, and distress; or to raise their intellectual, moral, and social condition; or to make improvement in their art; or for other proper purposes. *Or the association might be designed for purposes of oppression and injustice.*

This case, in some respects, seems to have been overruled or modified in the more recent case of *Vegelahn* v. *Guntner* (44 N. E. Rep., 1077), where it is cited and relied upon in support of the dissenting opinion.

Collins v. *Locke* (L. R., 4 App. Cas., 674), also cited on this proposition, is decided upon the theory that a reasonable restraint of trade is proper and lawful. It is, therefore, no authority in a case like the present, where the reasonableness of the restraint is immaterial.

The court there said:

> The modern decisions have mostly turned on the question of the *reasonableness of the restraint* in relation to the objects of the contract.

Carew v. *Rutherford* (106 Mass., 1) is an authority against the position of the appellants rather than in their favor. It is there decided that—

> A conspiracy to obtain from a master mechanic, whose business requires the employment of workmen, money which he is under no legal liability to pay *by inducing or threatening to induce workmen to leave his employment, and deterring or threatening to deter others from entering it, so as to render him reasonably apprehensive that he can not carry on business without making the payment, is illegal;* and, in an action of tort, he may recover the sum so paid and damages for the injury of his business by the acts of the conspirators.

The court there justly observed (p. 15):

> Freedom is the policy of this country. But freedom does not imply a right in one person, either alone or in combination with others, *to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with any annoyance or injury for the sake of compelling him to buy his peace.* The acts alleged and proven in this case are peculiarly *offensive* to the *free principles* which prevail in this country; and if such practices could enjoy impunity they would tend to establish a *tyranny of irresponsible persons* over labor and mechanical business which would be *extremely injurious* to both.

Bohn Manufacturing Co. v. *Hollis* (54 Minn., 223) was a ruling on the following facts: A large number of retail lumber dealers formed a voluntary association, in which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers at any point

where a member of the association was carrying on a retail yard, and provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale their secretary should notify all the members of the fact. The plaintiff made such a sale, and the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association. It was held not actionable.

The court said (p. 232):

> When reduced to its ultimate analysis, all that the retail lumber dealers in this case have done is to form *an association to protect themselves* from sales by wholesale dealers or manufacturers directly to consumers or other nondealers at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers not dealers at a point where a member of the association is doing business, and provide for notice being given to all members whenever a wholesale dealer or manufacturer makes any such sale. *There was no element of fraud, coercion, or intimidation, either toward plaintiff or the members of the association.*

It is apparent that there was here a partial restraint of trade, which the court, in the absence of a statute prohibiting partial restraints, held not to be unreasonable, following *Mogul Steamship Co.* v. *McGregor* (1892) (App. Cas., 25).

If the association in this case had been composed of the *retail dealers and the wholesale dealers*, with by-laws prohibiting dealing with nonmembers, and *establishing*

prices or *margin of profits* in the sale of lumber, and providing *heavy penalties* for infractions thereof, and *successfully controlling the entire business*, so as to *effectually prevent* any person not a member from dealing in the market, the case would have some elements of similarity to the one at bar. We respectfully submit that no one would regard such an organization as legal.

Brewster v. *Miller* (41 S. W. Rep., 301) is also cited. It appears that the articles of a funeral directors' association provided that members were not to render services for or furnish burial material to any person who failed or refused to discharge an existing indebtedness to any member of the association. This was held not to give rise to a civil action. It was, however, apparently conceded that the articles in question constituted a trust or conspiracy, as the court says:

> So, even if some of the articles of this association constitute a trust or conspiracy, still if there is *no overt act done in pursuance of such illegal provisions* which produce actual legal damages to the plaintiff he could not maintain his action. It would be a question with which the State should deal.

Delaware Railroad Co. v. *Stock Yards Co.* (45 N. J. Eq., 50) decides that a stock yards company, except in the character of the property which is subject to bailment, corresponds in many respects with the business of warehouseman, and that as a warehouseman can not have the possession of other men's property, with its accompanying duties and responsibilities, forced upon him against his will, so the stock yards company may decline to receive stock if it so desires.

In the case of *Thomas* v. *Musical Union* (121 N. Y., 45), the validity of the defendants' by-laws was not passed upon.

The court said (p. 54):

> We do not deem it necessary to consider the question of the validity of the by-laws, *as they are not necessarily involved in the determination of the action.*

The court held that the action was prematurely brought, saying:

> He could have urged to the board the *invalidity* of the by-laws, etc.

Much stress is laid upon the case of *American Live Stock Co.* v. *Chicago Live Stock Exchange* (143 Ill., 210). It is to be noted that that case was a controversy between the corporation and *one seeking membership therein.* The court holds that, even if the by-laws are against public policy (and this is practically conceded), they are illegal *only in the sense that the courts will not enforce them.* It is apparent, not only from what is said in the case, but from the subsequent ruling in *People* v. *Chicago Live Stock Exchange* (48 N. E. Rep., 1062), that had the legality of the association been attacked by the *State*, or some *representative of the public*, a different question would have arisen and doubtless a different ruling made.

The court said:

> A by-law of a corporation whose members are engaged in the buying and selling of live stock in a public market open to all which prohibits its members from dealing with certain other classes of corporations or their agents, if construed to be in

restraint of trade, and therefore against public policy, *is illegal only in the sense that the courts will not enforce the same.*

The law does not prohibit the making of contracts in restraint of trade, but merely *declines to recognize their validity* or to *enforce them.* A party to such a contract is not bound to perform it, but he may perform it if he sees fit, and his doing so exposes him to no legal animadversion.

Again, the court says (p. 235):

> They are simply void. The law does not *prohibit* the making of contracts in restraint of trade; it merely declines, after they have been made, to recognize their validity. If the by-laws in question are invalid because of being an *improper restraint of trade*, they are merely *void*, and the members of the exchange being under no legal obligation to obey them may perhaps be entitled at their own instance to protection against such disciplinary consequences as the exchange may see fit to impose in case of disobedience. But such *protection* can not be *invoked* in their behalf by a *stranger*, nor can they be required to disobey such rules except at their own volition.

The court here cites and follows *Mogul Steamship Co.* v. *McGregor* (1892) (App. Cas., 25), which this court has said, in the Trans-Missouri Freight Association Case, is inapplicable to proceedings under the antitrust act.

In *Macauley* v. *Tierney* (33 Atlantic, 1), it is said:

> An agreement by the members of a national association of master plumbers to withdraw their patronage from any dealer selling supplies to others than master plumbers is not unlawful, even though master plumbers be construed to mean the members of said association.

This case follows and is bottomed upon the case of *Mogul Steamship Co.* v. *McGregor*, and *Bohn Manufacturing Co.* v. *Hollis*, *supra*, and is inapplicable for the reasons suggested in our comments heretofore made on those cases.

Dueber Watch Co. v. *Howard Watch Co.* (55 Fed. Rep., 851) is also cited by appellants. The same case before the court of appeals is reported in 66 Fed. Rep., 637. Contracts in reference to the sale of watch cases were the subjects of the controversy. The case was decided before the authoritative construction of the anti-trust act by this court in the Trans-Missouri Case.

Judge Lacombe distinguishes the cases on the ground that the goods in question are not articles of prime necessity. He says (p. 642):

> The goods in question *are not articles of prime necessity*, as were the flour, coal, and other staple commodities referred to in many of the cases cited upon the argument; nor were the manufacturing defendants engaged in *any public or quasi-public business*, as were the railroad or the gaslighting companies referred to in other cases.

Judge Shipman concurred in sustaining the demurrer, but *solely* on the ground that the complaint charged an *attempt* to commit an offense without alleging its *actual commission*. He held that the business stated in the complaint was interstate commerce. He says:

> The important allegations in regard to the conduct of the combined defendants and the results of the acts are that the complainant owned an extensive watch-case manufactory in Kentucky, and subsequently in Ohio, and had the capacity to manufacture

and offer for sale 25,000 watch cases per month, and that before November 16, 1887, it sold all of said goods to a great number of dealers throughout the United States and Canada. *It may be admitted that this substantially alleges that the complainant engaged in interstate commerce.*

Judge Wallace said:

The primary purpose of the conspiracy set forth was doubtless to *compel the plaintiff to join in a compact with the other defendants to maintain an arbitrary price or scale of prices for their goods, or otherwise to drive the corporation out of business.* * * * No body of manufacturers is *justified* in *combining to coerce* a competing manufacturer to *join them* and sell his goods at a price to be fixed by them, and to *destroy his business* in the event of his refusal to do so; and it matters not that they propose to destroy his business by *peaceful methods of influencing his customers not to deal with him.* "Men can often do by the combination of many what severally no one could accomplish, and even what, when done by one, would be innocent." * * * I repudiate the doctrine that they can *combine* to induce the customers of a rival manufacturer *not to deal with him unless he will join their combination.* Upon the averments in this complaint, which are of course to be taken as true for the purposes of the demurrer, this case is one in which the defendants are acting not from motives of self-protection, but *oppressively*, and are *actively concerting to destroy the business of a rival by inducing other dealers not to trade with him because he will not sell his goods at their prices.*

THE LAW OF BOYCOTTS.

This question is also discussed in appellants' brief, page 231, and *Arthur* v. *Oakes* (63 Fed. Rep., 310) is

cited on the proposition that the members of the defendant exchange may refuse to deal, either collectively or individually, with any person as they please.

As we have endeavored to show heretofore, the right to withdraw one's business from another is unquestioned. It may be said abstractly that the right of any combination to withdraw their business from an individual is a right that may be lawfully exercised; but it is also true that such a combination, *if animated by a desire to injure the person or obstruct his business, is unlawful at common law.* This is tersely stated by Mr. Justice Harlan (63 Fed. Rep., 321) as follows:

> It is one thing for a single individual, or for several individuals, each acting upon his own responsibility and not in cooperation with others, to form for the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent, *not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public.* An intent on the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized *as in itself wrongful and illegal.* Citing *Sherry* v. *Perkins*, 147 Mass., 212; *United States* v. *Kane*, 23 Fed. Rep., 748; *Emack* v. *Kane*, 34 Fed. Rep., 46; *Casey* v. *Typographical Union*, 45 Fed. Rep., 135; *Walker*

v. *Cronin*, 107 Mass., 555; *Callan* v. *Wilson*, 127 U. S., 540; *State* v. *Glidden*, 55 Conn., 46; *State* v. *Stewart*, 59 Vt., 273.

Continental Ins. Co. v. *Board of Fire Underwriters* (67 Fed. Rep., 310) is also cited. It is there held that—

> An association of fire underwriters, formed under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents and nonintercourse with companies not members, is not an illegal conspiracy, and the accomplishment of its purposes by lawful means will not be enjoined at the instance of a company not a member of the association.

The opinion follows the McGregor Case. The distinction is recognized (p. 321) between attempts to secure a monopoly in articles of *prime necessity* and others.

The distinction is also made between an action by a nonmember against such an association for damages and an action by the Attorney-General directly against the organization.

Appellants' counsel cite *Jackson* v. *Stanfield* (137 Ind., 592) in support of the proposition that "it is not a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation shown in the complaint."

A reference to this case seems to us somewhat unfortunate for the appellants. It is a case very much like the one at bar. The facts were as follows:

The Retail Lumber Dealers' Association of Indiana by its by-laws gave an active member a claim against a wholesaler for selling to a person not a regular dealer in

such member's community, provided for a hearing of the claim by a committee, and required members to refuse to patronize a wholesaler who ignored the committee's decision. Plaintiff, who was not a regular dealer, underbid defendant on a contract, but wholesalers refused to sell to him, and he was obliged to abandon the contract, because defendant, an active member of the association, had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims. *Held*, that defendant was liable for the amount which plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff.

In this case, as in the case at bar, there was a combination between the wholesale dealer and the retail dealer, the former being an "honorary" and the latter an active member.

The court said:

> The special findings of fact clearly show it to be a compact *to suppress the competition of those dealers who did not own yards with an adequate stock on hand, by driving them out of business.* By this plan they reach *the wholesale dealer* and compel him to pay an arbitrary penalty, *under a threat of financial injury*, and they force him to assist in *ruining the dealer* who does not own a yard.

In the present case it can not be denied that the purpose of the exchange is to suppress the competition of commission men who are not members of the exchange by driving them out of business. By this plan they reach the *packing houses* under a threat of an arbitrary penalty

of from $500 to $1,000, and so force them to assist in ruining the nonmember.

The court continues:

> There is such an element of *coercion* and *intimidation in the by-law under consideration* toward the wholesale dealers, manufacturers, and even the members of the society, and such provision made for penalties and forfeitures against them, that it will not do to say it was *optional* with the wholesale dealer whether it would pay the demand or not, or that it was left to the discretion or choice of the members to either trade with the wholesaler or abandon the association.

So, also, it may be said that there is such an element of *coercion and intimidation in the by-laws under consideration in this case toward the packing houses, commission men, and nonmembers*, and such provisions made for penalties and forfeitures against them, that it will not do to say that it was *optional* with the packer whether he would deal with the nonmember at his discretion.

Again, the court says:

> A conspiracy formed and intended, directly or indirectly, *to prevent the carrying on of any lawful business*, or to injure the business of anyone, *by wrongfully preventing those who would be customers from buying anything from the representatives of such business, by threats or intimidation, is in restraint of trade and unlawful.*

The court holds that the threats of withdrawal of patronage constitute threats and intimidation within the rule.

> "The object of the association," says the court, "and the result attained is a *monopoly of the trade by*

> *owners of yards*, and the broker is simply ignored by the wholesale dealers. It is not in point to cite cases where men *voluntarily agree to observe rules adopted by themselves*. This is no *voluntary affair* of the *wholesale dealers*. It is not even a combination of *wholesalers*. They may and do sometimes become *honorary members*, so as to keep within touch of the retail dealers and secure trade. It is, as stated, an *association of retailers to restrict the liberty of wholesalers to sell to consumers and brokers, and the wholesalers must obey or lose their trade*."

In *Cote* v. *Murphy* (159 Penn. St., 420) the statute had legalized combinations of workingmen to raise the price of labor. The court recognized that without such legislation such a combination would be *illegal*, using this language (p. 429):

> Before any legislation on the question it was held that a *combination of workmen to raise the price of labor, or of employers to depress it, was unlawful*, because such combination interfered with the price, which would otherwise be regulated *by supply and demand;* this interference was in restraint of trade or business and prejudicial to the public at large. Such combination made an *artificial price*.

It appeared that a traders' exchange established the price of labor, so that "by artificial means the market supply was almost wholly cut off." It was accordingly held to be lawful for the employers to combine to defend themselves against a demand "made altogether regardless of the price as regulated by the supply."

It is claimed that the appellants are in the exercise of

A PURELY PRIVATE OCCUPATION.

Whatever may be the rule elsewhere, it is, we submit, well established in this court that the occupation of the appellants is one affected with a public interest.

The Kansas City Stock Yards Company has been held to be affected with a public interest. (*Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. Rep., 851; s. c. 82 Fed. Rep., 844.)

Thayer, C. J., speaking on this subject, said:

> The public have a greater interest in said property and in the management thereof than any other private property, because it is located in a *large city*, at the *junction point* of many lines of railroad, which radiate therefrom in all directions; because of the *vast number* of cattle and other live stock which annually seek a market in the cities where the property is located or pass through said cities on their way to other markets; and because of the *manner in which, according to business usages, the traffic in cattle is carried on.* The stock yards in question furnish *the only proper facilities* in the cities where they are located for handling, resting, and feeding stock which is in the course of transit to other markets. It is the place where buyers and sellers of live stock congregate and transact their daily business, and for that reason it is *the only available market place* in said cities where live stock can be conveniently sold and delivered. The stock yards company, by its foresight and energy, has doubtless done much to create these conditions; but the fact remains that nearly all cattle shippers and dealers residing in

States and Territories tributary to the Kansas City market *are compelled to avail themselves of the facilities which the stock yards company affords and to pay such charges as it may see fit to impose;* therefore it is that the proper legislative body has the power to fix a limit to such charges, to the end that they may not become excessive and unreasonable. To such regulations every person and corporation must submit when their property is of such character or is so situated and subject to such environments that many people are compelled to become their patrons. (*Munn* v. *Illinois*, 94 U. S., 113, 130.)

In *Munn* v. *Illinois* (94 U. S., 130) various subjects are spoken of as being affected with a public interest and so subject to regulation. It is pointed out that Congress conferred power upon the city of Washington "to make all necessary regulation respecting hackney carriages and the rates of fare of the same, and the rates of haul by cartmen, wagoners, carmen, and draymen, and the *rates of commission of auctioneers.*" It is held that "property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large."

Various employments are instanced as being affected with a public use, such as the operation of ferries, wharves, cranes, warehouses, mills, bridges, turnpike roads, common carriers, and kindred subjects.

It is difficult to see why the doctrine of *Munn* v. *Illinois*, *supra*, does not apply to the defendant commission men. As pointed out by Judge Thayer, the stock yards is a place where buyers and sellers congregate and trans-

act their daily business. . *It is the only available market.* All cattle shippers and dealers residing in States and Territories tributary to the Kansas City market are *compelled* to avail themselves of the services of the commission men and to pay such charges as they may see fit to impose. The peculiar nature of the stock business, the fact that more than one stock yard in a large city is *impracticable*, and the fact that the selling of stock at the Kansas City yards is *impracticable without the aid of a commission man*, make his business one affected with a public interest.

Munn v. *Illinois* (94 U. S., 131) might be modified and paraphrased to correctly state the rule in reference to the appellants as follows:

> Under such circumstances, it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney coachman pursues a public employment and exercises "a sort of public office," these appellants do not. They stand, to use the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every animal for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such commission man "ought to be under public regulation, viz, that he take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the *statute*, but it is by *the facts*.

So it appears that it is not the statute but "the facts" which affect an employment with a public interest. Indeed, the court says further (p. 134):

> In matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. *The controlling fact is the power to regulate at all.* If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

This ruling has been affirmed in *Budd* v. *New York* (143 U. S., 517), and *Brass* v. *North Dakota* (153 U. S., 391).

The employment of the defendants, therefore, *being affected with a public interest*, the reasons are even more forcible than otherwise for prohibiting contracts and conspiracies in restraint of trade, and especially in reference to articles of *prime necessity*.

MATTERS ABOUT WHICH THE ATTORNEY-GENERAL CAN SUE.

It is objected that this action is improperly instituted by the Government. The objection is made that the Government has been hoodwinked in some way into the bringing of the action, in order to adjust private matters of difference between the defendant exchange and Greer, Mills & Co. It is sufficient to say in reply that if the organization of the appellants is lawful that

is the end of the controversy, and the existence or non-existence of private grievances are wholly immaterial. On the other hand, if the appellants' organization is unlawful and in violation of the act of Congress, it does not rest with them to say who shall or shall not be the prosecuting witness. It is unnecessary that they should be consulted in this respect. If, in criminal prosecutions, the defendant were permitted to plead in bar that the prosecuting witness was a *persona non grata*, few prosecutions would be successful.

Appellants' brief is replete with expressions of "bitter hostility," "personal vengeance and anger," "private malice," and the like. The affidavits of the complainant (and this brief, it is hoped) will be found to be free from expressions of feeling of this nature. It is a subject with which the Government is not concerned.

As appears from the official correspondence, which was read to the lower court, the matter was thoroughly investigated by the United States attorney, and afterwards the Attorney-General, with a full knowledge of all the facts, directed that this suit be brought. The signature of Mr. Judson Harmon, then the Attorney-General, will be found attached to the bill.

A similar question was presented in *People* v. *Milk Exchange* (39 N. E. Rep., 1062). It was there, as in the case at bar, claimed that the action of the authorities in instituting suit was instigated by a rival concern; but the court disposed of that contention in the following language:

> It is asserted that this litigation was instituted upon a petition of members of the Milk Producers'

Union, and that the purpose of that association was to enhance the price of milk. This may be, but the action was brought by the Attorney-General, and the influences that operated upon him to induce his prosecution of the defendant are now unimportant. The questions for our determination are presented by the pleadings, and the parties have the right to have them determined upon the merits.

Appellants finally assail the constitutionality of the act of July 2, 1890; but as this case was not raised in the court below, and no opportunity was given to the court to pass upon it, it is difficult to see how the question can be raised here.

Wasatch Min. Co. v. *Crescent Min. Co.*, 148 U. S., 293.

Brown v. *Massachusetts*, 144 U. S., 579.

Carpenter v. *Strange*, 141 U. S., 87.

It is respectfully submitted that the order and decree of the lower court should be affirmed.

JOHN K. RICHARDS,
Solicitor-General.

SAMUEL W. MOORE,
Special Assistant to the Attorney-General.